IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. ---------

TONY TUDRYCK and MARY TUDRYCK, his wife,
Plaintiffs and Appellants,

vs.

J. O. MUTCH, ETC., Cashier of Sterling Bank of Sleeper and Chamberlain, et als.,

---

(JOSEPH MARTIN, Receiver of Sterling Bank of Sleeper and Chamberlain,
Defendants, Appellees and Respondents),
and

ANDREW SMYL and VICTORIA SMYL,
Defendants and Appellants, and Petitioners.

PETITION FOR WRIT OF CERTIORARI

I.

STATEMENT OF FACTS

(Figures in parentheses refer to pages of printed record unless context clearly indicates otherwise)

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Petitioners respectfully show unto the Court as follows:

I. STATEMENT OF MATTER INVOLVED.

1. On August 16, 1938, Tony and Mary Tudryck filed the original bill of complaint (4-31) in this case against

Harvey A. Chamberlain, doing business as the Sterling Bank of Sleeper and Chamberlain, and others, asking for an accounting and the cancellation of three mortgages held by the bank, including a deed dated 1924 executed by Tony and Mary Tudryck and Andrew and Victoria Smyl, claimed to be in the nature of a mortgage. Petitioners Smyl were named as Parties Defendant. Although paragraph VI of the bill (10) alleges that the Tudrycks had "purchased" the interest of the Smyls in the property in issue, paragraph XIV (22) states specifically that no personal relief is sought against the Smyls. The prayers (22-26) likewise requested no relief against the Smyls and none of their rights were put in issue by the Tudryck bill.

2. On August 24, 1938, Plaintiffs filed a proof of service of the original bill and summons upon the Smyls (35-37). Petitioners' default for non-appearance was entered by Plaintiffs on October 3, 1938 (82-84). On the same date the joint answer of J. Otis Mutch and Harvey A. Chamberlain was filed, including a cross-bill naming Plaintiffs Tudryck and Petitioners Smyl as cross-defendants (45-76). Although the Tudrycks answered the cross-bill (77-80), no summons was issued pursuant to the cross-bill, and neither a summons nor the cross-bill was served upon the Smyls.

3. The answer of Mutch and Chamberlain specifically denies that the Tudrycks were the sole owners of property in question. Paragraph 1 of the Answer states (46-47):

> "They deny that on the 1st day of March, A. D. 1934, and for some considerable time prior thereto that plaintiffs were the owners of the fee of the premises described in paragraph I of the bill of complaint. In support of said denial these defendants say that on the 24th day of May, 1920 John Boron and Katherine Boron, husband and wife, conveyed the West half of the Northeast quarter and the East half of the Northeast quarter, Section eight (8) Town nineteen (19) North, Range four (4) East together with other land to Tony Tudryck and Andrew Smyl in the following proportions, to-wit: to Tony Tudryck a two-thirds interest and to Andrew Smyl a one-third interest subject to two mortgages held by the Sterling

Bank of Sleeper & Chamberlain. That said deed is recorded in the Office of Register of Deeds of Arenac County, Michigan in Liber 55 of Deeds on page 84 to which reference is prayed. That on the 22nd day of January, 1923 Robert W. Childs and Amelia Childs, husband and wife, conveyed the West half of the East half of the Southeast quarter and the East one-quarter of the West half of the Southeast quarter of Section eight (8), Town nineteen (19) North, Range four (4) East to Tony Tudryck and Mary Tudryck, and Andrew Smyl and Victoria Smyl. That said deed is recorded in the office of Register of Deeds of Arenac County, Michigan in Liber 56 of Deeds on page 364 to which reference is prayed. That these defendants say on information and belief that the said Andrew Smyl and Victoria Smyl have never executed and delivered any instrument in writing conveying their said interest in and to the above described property to the plaintiffs or either of them."

4. The answer of Mutch and Chamberlain (paragraph 6) further denies that the Tudrycks had purchased the interest of the Smyls in the property (50-51).

5. The cross-bill of complaint sets forth that the Tudrycks and Smyls were co-owners of the property in suit, subject to three mortgages, including a deed in the nature of a mortgage, and prays for the foreclosure of the same (61-71).

6. At the hearing in the Circuit Court the parties thereto introduced into evidence the above mentioned deeds recorded in Liber 55 of Deeds at page 84 (313) and in Liber 56 of Deeds at page 364 (324) showing affirmatively that Tony Tudryck and Mary Tudryck and Andrew Smyl and Victoria Smyl were co-owners of the property in question, as set forth in the Answer and Cross-bill of the Sterling Bank in whose position the receiver now stands. No evidence was introduced showing or tending to show that the Smyls had disposed of their interest in the property involved.

In the affidavits attached to their motions to set aside the decree the Smyls claim their interest in the property to be the same as is set out in the answer and cross-bill of

Mutch and Chamberlain, to whose rights Joseph Martin, Receiver, has now succeeded (110-119).

7. On November 7, 1938, Joseph Martin, then the temporary receiver of the Sterling Bank of Sleeper and Chamberlain, filed a petition to intervene in the cause (85-86). A stipulation was filed by the attorneys for Mutch, Chamberlain and the Tudrycks consenting to the intervention (87) pursuant to which an order of intervention was signed by the trial court on November 7, 1938 (88). The temporary receiver then filed an instrument adopting the answer and cross-bill of Mutch and Chamberlain (88-89). No notice of the intervention proceeding was given to Petitioners Smyl.

8. On January 27, 1940, over two years after the Smyls had been defaulted for failing to answer the Tudryck bill of complaint, which bill specifically stated that no relief was claimed against the Smyls, a stipulation was executed and filed by counsel for H. L. Switzer, who had been appointed permanent receiver of the Sterling Bank of Sleeper and Chamberlain, and counsel for the Tudrycks, which stipulation provided in part:

> "That said decree shall provide that upon payment of the sum of $300.00 to said plaintiffs, that said H. D. Switzer, Receiver as aforesaid, shall become the owner in fee simple of the lands and premises above described, including hereditaments and appurtenances thereunto belonging and all minerals in and under said premises. That said defendants, Andrew Smyl and Victoria Smyl, as well as all other parties to said cause have no right, title or interest whatsoever in and to the said lands and premises, including hereditaments and appurtenances and minerals thereunder, and that all interest in said premises is held by said defendant and cross plaintiff, H. L. Switzer, Receiver of said Sterling Bank of Sleeper and Chamberlain."

9. Prior to this date H. L. Switzer, permanent receiver, was a stranger to this proceeding. He had never been intervened, added or substituted as a party until April 23, 1946, over six years after the date of the decree, which was entered on January 27, 1940 (100). On April

23, 1946, the trial court, on its own motion, on the hearing of Petitioners' motion to set aside said decree, entered a so-called "Order of Substitution and Intervention of H. L. Switzer, Successor Receiver" (221-223). H. L. Switzer was not a successor receiver, but was the original permanent receiver, having been appointed on December 13, 1938 (505-507).

10. On January 27, 1940, pursuant to the stipulation between counsel for Switzer, permanent receiver, and counsel for the Tudrycks, a decree was entered by the trial court which recites (100):

> "This cause having heretofore come on to be heard upon the bill of complaint filed herein by Plaintiffs, Tony Tudryck and Mary Tudryck, his wife, the original answer thereto by J. Otis Mutch and Harvey A. Chamberlain, the cross-bill of complaint filed by J. Otis Mutch and Harvey A. Chamberlain, the answer to said cross-bill and reply to answer on behalf of said cross-defendants, Tony Tudryck and Mary Tudryck, his wife, default as to said defendants, Andrew Smyl and Victoria Smyl, his wife, having heretofore herein been regularly entered; Joseph Martin, Temporary Receiver of said Sterling Bank of Sleeper and Chamberlain, having appeared in said cause, and thereafter appearance having been entered by H. L. Switzer, Receiver of said Sterling Bank of Sleeper and Chamberlain, who succeeded Joseph Martin, Temporary Receiver as aforesaid;"

11. A reference to the calendar entries fails to disclose the entry of a default on the part of the Smyls excepting on the Tudryck bill which claimed no relief against them (1-4). The calendar entries (1-4) likewise fail to disclose the appearance of H. L. Switzer, the original permanent receiver, or any proceeding to add, intervene or substitute him as a party.

12. The decree entered by the trial court, following the above-mentioned stipulation, provides in so far as the motion of Petitioners is concerned as follows (103):

> "IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Andrew Smyl and Victoria Smyl,

cross-defendants, or either of them, have at the date hereof, no right, title or interest whatsoever in and to the premises herein involved, it being further ORDERED, ADJUDGED and DECREED that all their right, title and interest in and to said premises, and in any manner arising, and whether applicable to the lands herein involved, the hereditaments and appurtenances on the surface of said land appertaining thereto, or any coal and/or mineral, and/or other rights, incident to said land, and under the surface thereof, did heretofore by reason of their sale of all their interest therein, to Tony Tudryck and Mary Tudryck, his wife, cease and did become null and void and of no force and effect, the said Andrew Smyl and Victoria Smyl his wife, being described at this date to have no right, title or interest whatsoever in and to the same."

13. Petitioners filed a motion to set aside the decree on August 16, 1944 (107-119). After a hearing was had an opinion (207-213) and order (216-218) were entered by the trial court denying Petitioners' motion. The trial court, on its own motion, entered a further order of substitution and intervention, intervening and substituting H. L. Switzer, permanent receiver, in the place and stead of Joseph Martin, temporary receiver. Said order is dated April 23, 1946, but provides that same "be entered nunc pro tunc as of December 16, 1938," the date Switzer qualified as permanent receiver (223).

14. A motion (227) to set aside the above order of substitution and intervention of H. L. Switzer, permanent receiver, was denied by the trial court on July 8, 1946 (250).

Leave to appeal from said orders of the trial court was granted by the Supreme Court on October 18, 1946 (263).

The matter was heard in the Supreme Court of the State of Michigan on October 14, 1947, and a decision rendered by the Supreme Court of the State of Michigan affirming the decision of the Circuit Court dated January 6, 1948, is now reported in Volume 320 of the Michigan Reports at page 99, to which reference is hereby prayed.

15. The opinion of the Supreme Court of the State of Michigan found and held that no constitutional question was involved. This finding, in the opinion of Petitioners, is contrary to the law and fact in that the Fourteenth Amendment to the Constitution of the United States was abridged by the decree of the Court vesting title to Petitioners' interest in the property in suit in the permanent receiver of the bank; notwithstanding the fact that the Petitioners had not been served with the cross-bill filed by the bank; that the permanent receiver was a stranger to the proceeding until several years after the decree was entered, at which time he was added by an ex parte nunc pro tunc order of the trial Court; that the decree was not responsive to the pleadings of the bank, which were adopted by the temporary receiver as his pleadings, which pleadings sought only a statutory foreclosure of three mortgages held by the bank, including a deed admitted to be in the nature of a mortgage. The amount involved is in excess of $10,000.00 and upwards.

II.

STATEMENT OF JURISDICTION

16. Petitioners claim that this court has jurisdiction to issue its Writ of Certiorari to the Supreme Court of the State of Michigan, to review its affirmance on January 6, 1948, of the order of the trial court, under the provisions of the Act of Congress of February 13, 1925, Chapter 229, 43 Stat. 936, as amended, Section 237(b) thereof, which provides as follows:

> "Sec. 237(b). It shall be competent for the Supreme Court by certiorari to require that there be certified to it for review and determination, with the same power and with like effect as if brought up by writ of error, any cause wherein *a final judgment or decree* has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States, or where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution,

treaties, or laws of the United States, or where *any title, right, privilege or immunity* is specially set up or claimed by either party under the Constitution or any treaty or statute of, or commission held or authority exercised under the United States and the power to review under this paragraph may be exercised as well where the Federal Claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error, in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph."

III.

QUESTIONS PRESENTED

17. The questions presented by this petition for a Writ of Certiorari are as follows:

Was the decree entered in the state court vesting title to Petitioners' interest in the property involved in the permanent receiver, who was not a formal party to the proceeding, pursuant to a stipulation to which Petitioners were not a party, in a proceeding in which they had not been served with the cross-bill filed by the bank, to whose rights the receiver succeeded, and not responsive to any issues raised by the pleadings, void

(a) Because it deprived the Petitioners herein of property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States of America, and

(b) Because it denied to petitioners the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States of America.

IV.

REASONS RELIED ON FOR ISSUANCE OF THE WRIT OF CERTIORARI

18. Petitioners rely upon the following reasons as to why this court should issue its Writ of Certiorari:

(a) Because a State Court has decided a federal question in a way probably not in accord with applicable decisions of this Court.

(b) Because the Supreme Court of the State of Michigan did through the entry of opinion as in this cause filed, neglect, fail and refuse to find that a Constitutional question was involved.

(c) Because the conclusion of the Supreme Court of the State of Michigan that no Constitutional question was involved was erroneous and contrary to the heretofore announced decisions of this Court in like cases made and provided.

(d) Because this question of want of due process in violation of the Fourteenth Amendment of the Constitution of the United States on occasions similar to the case here at bar has heretofore many times been determined by this Court which has repeatedly held that there is such a violation of such Constitutional provision when the decree is not responsive to issues raised by the pleadings.

(e) Because in affirming the order of the lower court denying Petitioners' motion to vacate said decree, the Michigan Supreme Court permitted the respondent receiver to acquire title in fee simple to the interest of Petitioners in the premises involved without due process of law and in violation of the Fourteenth Amendment to the Constitution of the United States for the reason that they were not served with process and did not receive due notice that their rights were to be placed in jeopardy.

(f) Because in affirming the order of the lower court denying unto Petitioners vacation of decree as in said proceeding signed, filed and entered, the Supreme Court of the State of Michigan permitted the respondent re-

ceiver herein to acquire title in fee simple to the premises in this cause involved and did thereby deny unto the petitioners herein the equal protection of the law as guaranteed unto them by the Fourteenth Amendment to the Constitution of the United States.

WHEREFORE these Petitioners pray that a Writ of Certiorari issue out of this Court directed to the Supreme Court of the State of Michigan, to review the decision of that court under date of January 6, 1948, affirming the order of the trial court denying Petitioners' application to vacate decree as entered in the court below.

Andrew Smyl,
Victoria Smyl,
Petitioners.

Robert C. Winter,
Of Counsel.
2850 Penobscot Building,
Detroit 26, Michigan;

and

J. P. Mikesell,
Attorneys for Petitioners.
2264 Penobscot Building,
Detroit 26, Michigan.

STATE OF MICHIGAN
SS
COUNTY OF ARENAC

On this 5th day of March, 1948, before me, a notary public in and for said county, personally appeared ANDREW SMYL and VICTORIA SMYL, his wife, petitioners named in the foregoing petition, who made oath and said that they have read the foregoing petition by them subscribed, and know the contents thereof, and that the same is true of their own knowledge, except as to those matters therein stated to be upon information and belief, and as to those matters, they believe them to be true.

Florence LaBarge,
Notary Public, Arenac County, Michigan.
My commission expires: 6-2-50.

FILE COPY

[illegible]

SUPREME [illegible]

UNITED STATES

OCTOBER TERM, [illegible]

No. 710

ANDREW SMYL and VICTORIA SMYL,
his wife,
Petitioners,
vs.

JOSEPH MARTIN, Receiver of the Sterling Bank
of Sleeper and Chamberlain, et al,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI ON BEHALF OF PETITIONERS SMYL

ROBERT C. WINTER,
Of Counsel.
Business Address:
2850 Penobscot Building,
Detroit 26, Michigan.
and
J. P. MIKESELL,
Attorney for Petitioners.
Business Address:
2264 Penobscot Building,
Detroit 26, Michigan.

AMERICAN BRIEF AND RECORD CO., GRAND RAPIDS, MICHIGAN

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Defendants, Appellees and Respondents),
and

ANDREW SMYL and VICTORIA SMYL,
Defendants and Appellants, and Petitioners.

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I.

STATEMENT OF FACTS

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On August 16, 1938, Tony and Mary Tudryck filed the original bill of complaint (4-31) in this case against Harvey A. Chamberlain, doing business as the Sterling Bank of Sleeper and Chamberlain, and others, asking for an accounting and the cancellation of three mortgages held by the bank, including a deed dated November 22, 1924

executed by Tony and Mary Tudryck and Andrew and Victoria Smyl, claimed to be in the nature of a mortgage. Petitioners Smyl were named as Parties Defendant. Although paragraph VI of the bill (10) alleges that the Tudrycks had "purchased" the interest of the Smyls in the property in issue, paragraph XIV (22) states specifically that no personal relief is sought against the Smyls. The prayers (22-26) likewise requested no relief against the Smyls and none of their rights were put in issue by the Tudryck bill.

On August 24, 1938, Plaintiffs filed a proof of service of the original bill and summons upon the Smyls (35-37). Petitioners' default for non-appearance was entered by Plaintiffs on October 3, 1938 (82-84). On the same date the joint answer of J. Otis Mutch and Harvey A. Chamberlain was filed, including a cross-bill naming Plaintiffs Tudryck and Petitioners Smyl as cross-defendants (45-76). Although the Tudrycks answered the cross-bill (77-80), no summons was issued pursuant to the cross-bill, and neither a summons nor the cross-bill was served upon the Smyls.

The answer of Mutch and Chamberlain specifically denies that the Tudrycks were the sole owners of property in question. Paragraph 1 of the Answer states (46-47):

> "They deny that on the 1st day of March, A. D. 1934, and for some considerable time prior thereto that plaintiffs were the owners of the fee of the premises described in paragraph I of the bill of complaint. In support of said denial these defendants say that on the 24th day of May, 1920 John Boron and Katherine Boron, husband and wife, conveyed the West half of the Northeast quarter and the East half of the Northeast quarter, Section eight (8), Town nineteen (19) North Range four (4) East together with other land to Tony Tudryck and Andrew Smyl in the following proportions, to-wit: to Tony Tudryck a two-thirds interest and to Andrew Smyl a one-third interest subject to two mortgages held by the Sterling Bank of Sleeper & Chamberlain. That said deed is

recorded in the office of Register of Deeds of Arenac County, Michigan in Liber 55 of Deeds on page 84 to which reference is prayed. That on the 22nd day of January, 1923 Robert W. Childs and Amelia Childs, husband and wife, conveyed the West half of the East half of the Southeast quarter and the East one-quarter of the West half of the Southeast quarter of Section eight (8), Town nineteen (19) North, Range four (4) East to Tony Tudryck and Mary Tudryck, and Andrew Smyl and Victoria Smyl. That said deed is recorded in the office of Register of Deeds of Arenac County, Michigan, in Liber 56 of Deeds on page 364 to which reference is prayed. That these defendants say on information and belief that the said Andrew Smyl and Victoria Smyl have never executed and delivered any instrument in writing conveying their said interest in and to the above described property to the plaintiffs or either of them."

The answer of Mutch and Chamberlain (paragraph 6) further denies that the Tudrycks had purchased the interest of the Smyls in the property (50-51).

The cross-bill of complaint sets forth that the Tudrycks and Smyls were co-owners of the property in suit, subject to three mortgages, including a deed in the nature of a mortgage, and prays for the foreclosure of the same (61-71).

At the hearing in the Circuit Court the parties thereto introduced into evidence the above mentioned deeds recorded in Liber 55 of Deeds at page 84 (313) and in Liber 56 of Deeds at page 364 (324) showing affirmatively that Tony Tudryck and Mary Tudryck and Andrew Smyl and Victoria Smyl were co-owners of the property in question, as set forth in the Answer and Cross-bill of the Sterling Bank in whose position the receiver now stands. No evidence was introduced showing or tending to show that the Smyls had disposed of their interest in the property involved.

In the affidavits attached to their motions to set aside the decree the Smyls claim their interest in the property to be the same as is set out in the answer and cross-bill of Mutch and Chamberlain, to whose rights Joseph Martin, receiver, has now succeeded (110-119).

On November 7, 1938, Joseph Martin, then the temporary receiver of the Sterling Bank of Sleeper and Chamberlain, filed a petition to intervene in the cause (85-86). A stipulation was filed by the attorneys for Mutch, Chamberlain and the Tudrycks consenting to the intervention (87) pursuant to which an order of intervention was signed by the trial court on November 7, 1938 (88). The temporary receiver then filed an instrument adopting the answer and cross-bill of Mutch and Chamberlain (88-89). No notice of the intervention proceeding was given to Petitioners Smyl.

On January 27, 1940, over two years after the Smyls had been defaulted for failing to answer the Tudryck bill of complaint, which bill specifically stated that no relief was claimed against the Smyls, a stipulation was executed and filed by counsel for H. L. Switzer, who had been appointed permanent receiver of the Sterling Bank of Sleeper and Chamberlain, and counsel for the Tudrycks, which stipulation provided in part:

> "That said decree shall provide that upon payment of the sum of $300.00 to said plaintiffs, that said H. L. Switzer, Receiver as aforesaid, shall become the owner in fee simple of the lands and premises above described, including hereditaments and appurtenances thereunto belonging and all minerals in and under said premises. That said defendants, Andrew Smyl and Victoria Smyl, as well as all other parties to said cause have no right, title or interest whatsoever in and to the said lands and premises, including hereditaments and appurtenances and minerals thereunder, and that all interest in said premises is held by said defendant and cross-plaintiff, H. L. Switzer, Receiver of said Sterling Bank of Sleeper and Chamberlain."

Prior to this date H. L. Switzer, permanent receiver, was a stranger to this proceeding. He had never been intervened, added or substituted as a party until April 23, 1946, over six years after the date of the decree, which was entered on January 27, 1940 (100). On April 23, 1946, the trial court, on its own motion, on the hearing of Petitioners' motion to set aside said decree, entered a so-called "Order of Substitution and Intervention of H. L. Switzer, Successor Receiver" (221-223). H. L. Switzer was not a successor receiver, but was the original permanent receiver, having been appointed on December 13, 1938 (505-507).

On January 27, 1940, pursuant to the stipulation between counsel for Switzer, permanent receiver, and counsel for the Tudrycks, a decree was entered by the trial court which recites (100):

> "This cause having heretofore come on to be heard upon the bill of complaint filed herein by Plaintiffs, Tony Tudryck and Mary Tudryck, his wife, the original answer thereto by J. Otis Mutch and Harvey A. Chamberlain, the cross-bill of complaint filed by J. Otis Mutch and Harvey A. Chamberlain, the answer to said cross-bill and reply to answer on behalf of said cross-defendants, Tony Tudryck and Mary Tudryck, his wife, default as to said defendants, Andrew Smyl and Victoria Smyl, his wife, having heretofore herein been regularly entered; Joseph Martin, Temporary Receiver of said Sterling Bank of Sleeper and Chamberlain, having appeared in said cause, and thereafter appearance having been entered by H. L. Switzer, Receiver of said Sterling Bank of Sleeper and Chamberlain, who succeeded Joseph Martin, Temporary Receiver as aforesaid;"

A reference to the calendar entries fails to disclose the entry of a default on the part of the Smyls excepting on the Tudryck bill which claimed no relief against them (1-4). The calendar entries (1-4) likewise fail to disclose the appearance of H. L. Switzer, the original permanent receiver, or any proceeding to add, intervene or substitute him as a party.

The decree entered by the trial court, following the above-mentioned stipulation, provides in so far as the motion of Petitioners is concerned as follows (103):

> "IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Andrew Smyl and Victoria Smyl, cross-defendants, or either of them, have at the date hereof, no right, title or interest whatsoever in and to the premises herein involved, it being further ORDERED, ADJUDGED and DECREED that all their right, title and interest in and to said premises, and in any manner arising, and whether applicable to the lands herein involved, the hereditaments and appurtenances on the surface of said land appertaining thereto, or any coal and/or mineral, and/or other rights incident to said land, and under the surface thereof, did heretofore by reason of their sale of all their interest therein, to Tony Tudryck and Mary Tudryck, his wife, cease and did become null and void and of no force and effect, the said Andrew Smyl and Victoria Smyl his wife, being described at this date to have no right, title or interest whatsoever in and to the same."

Petitioners filed a motion to set aside the decree on August 16, 1944 (107-119). After a hearing was had an opinion (207-213) and order (216-218) were entered by the trial court denying Petitioners' motion. The trial court, on its own motion, entered a further order of substitution and intervention, intervening and substituting H. L. Switzer, permanent receiver, in the place and stead of Joseph Martin, temporary receiver. Said order is dated April 23, 1946, but provides that same "be entered nunc pro tunc as of December 16, 1938," the date Switzer qualified as permanent receiver (223).

A motion (227) to set aside the above order of substitution and intervention of H. L. Switzer, permanent receiver, was denied by the trial court on July 8, 1946 (250).

Leave to appeal from said orders of the trial court was granted by the Supreme Court on October 18, 1946 (263).

The matter was heard in the Supreme Court of the State of Michigan on October 14, 1946, and a decision rendered by the Supreme Court of the State of Michigan affirming the decision of the Circuit Court dated January 6, 1948, is now reported in Volume 320 of the Michigan Reports at page 99, to which reference is hereby prayed.

The opinion of the Supreme Court of the State of Michigan found and held that no constitutional question was involved. This finding, in the opinion of Petitioners, is contrary to the law and fact in that the Fourteenth Amendment to the Constitution of the United States was abridged by the decree of the Court vesting title to Petitioners' interest in the property in suit in the permanent receiver of the bank; notwithstanding the fact that the Petitioners had not been served with the cross-bill by the bank; that the permanent receiver was a stranger to the proceeding until several years after the decree was entered, at which time he was added by an ex parte nunc pro tunc order of the trial Court; that the decree was not responsive to the pleadings of the bank, which were adopted by the temporary receiver as his pleadings, which pleadings sought only a statutory foreclosure of three mortgages held by the bank, including a deed admitted to be in the nature of a mortgage. The amount involved is in excess of $10,000.00 and upwards.

II.

QUESTIONS PRESENTED

The questions presented by this petition for a Writ of Certiorari are as follows:

Was the decree entered in the state court vesting title to Petitioners' interest in the property involved in the permanent receiver, who was not a formal party to the proceeding, pursuant to a stipulation to which Petitioners were not a party, in a proceeding in which they had not been served with the cross-bill filed by the bank, to whose rights the receiver succeeded, and not responsive to any issues raised by the pleadings, void

(a) Because it deprived the Petitioners herein of property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States of America, and

(b) Because it denied to petitioners the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States of America.

III.

STATEMENT OF JURISDICTION

Petitioners claim that this court has jurisdiction to issue its Writ of Certiorari to the Supreme Court of the State of Michigan, to review its affirmance on January 6, 1948, of the order of the trial court, under the provisions of the Act of Congress of February 13, 1925, Chapter 229, 43 Stat. 936, as amended, Section 237(b) thereof, which provides as follows:

> "Sec. 237(b). It shall be competent for the Supreme Court by certiorari to require that there be certified to it for review and determination, with the same power and with like effect as if brought up by writ of error, any cause where *a final judgment or decree* has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States, or where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, or laws of the United States, or where *any title, right, privilege or immunity* is specially set up or claimed by either party under the Constitution or any treaty or statute of, or commission held or authority exercised under the United States and the power to review under this paragraph may be exercised as well where the Federal Claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of

error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph."

IV.

REASONS RELIED ON FOR THE ISSUANCE OF THE WRIT OF CERTIORARI

Petitioners rely upon the following reasons as to why this Court should issue its Writ of Certiorari:

(a) Because a State Court has decided a federal question in a way probably not in accord with applicable decisions of this Court.

(b) Because the Supreme Court of the State of Michigan did through the entry of opinion as in this cause filed, neglect, fail and refuse to find that a constitutional question was involved.

(c) Because the conclusion of the Supreme Court of the State of Michigan that no constitutional question was involved was erroneous and contrary to the heretofore announced decisions of this Court in like cases made and provided.

(d) Because this question of want of due process in violation of the Fourteenth Amendment of the Constitution of the United States on occasions similar to the case here at bar has heretofore many times been determined by this Court which has repeatedly held that there is such a violation of such constitutional provision when the decree is not responsive to issues raised by the pleadings.

(e) Because in affirming the order of the lower court denying Petitioners' motion to vacate said decree, the Michigan Supreme Court permitted the respondent receiver to acquire title in fee simple to the interest of Petitioners in the premises involved without due process of law and in violation of the Fourteenth Amendment to the Constitution of the United States for the reason that they were not served with process and did not receive due notice that their rights were to be placed in jeopardy.

(f) Because in affirming the order of the lower court denying unto Petitioners vacation of decree as in said pro-

ceeding signed, filed and entered, the Supreme Court of the State of Michigan permitted the respondent receiver herein to acquire title in fee simple to the premises in this cause involved and did thereby deny unto the Petitioners herein the equal protection of the law as guaranteed unto them by the Fourteenth Amendment to the Constitution of the United States.

V.

ARGUMENT

1. The decree is void as against Petitioners for the reason that it was entered pursuant to a stipulation executed by two of the parties, but not executed by Petitioners, in a proceeding in which they were not served with the cross-bill, the only pleading claiming relief against them; said decree not being responsive to any issues raised by the pleadings.

The bill of complaint filed by the Tudrycks prayed for the cancellation of three (3) mortgages which they alleged were paid in full, including a deed executed by the Smyls and Tudrycks to the bank in the nature of a mortgage. The bank and the Smyls were named as parties defendant in the Tudryck bill. The complaint specifically said (par. 14, R. 22) that no relief was sought against the Smyls except to prove that the above-mentioned deed given by the Smyls and Tudrycks to the bank was in fact a mortgage. The Tudryck complaint in no place put in issue the question of the title of the Smyls to the property in suit.

The answer filed by the bank specifically and correctly set forth that the Smyls were the owners of an interest in the property as co-tenants with the Tudrycks, referring in support thereof to two (2) deeds whereby said parties took and held title; said deeds being referred to as recorded in Liber 55 of Deeds at page 84 (46), and in Liber 56 of deeds at page 364 (46). The bank's answer is followed by a cross-bill of complaint (61-70) which named the Smyls and Tudrycks as cross-defendants (61). The cross-bill is in the usual form, praying for a statutory foreclosure of three (3) mortgages, including the deed executed by the Smyls

and Tudrycks to the bank, which it admitted was in fact a mortgage. The Smyls were not served with the cross-bill. They did not answer or plead to the same. They were defaulted for not answering the Tudryck bill, the complaint which claimed no relief against them. (See calendar entries, R. 1).

At the trial the testimony introduced consisted principally of documentary evidence (Ex. 1, R. 271) and the cross-examination of one (1) witness. This documentary evidence included the records of the Office of the Register of Deeds for Arenac County showing the recordings of the above-mentioned deeds recorded in Liber 55 of Deeds at Page 84 (313) and in Liber 56 of Deeds at Page 364 (234). These were the same deeds set forth in the answer and cross-bill of the bank in which the bank alleged that the Smyls and Tudrycks were co-owners of the property in suit.

The answer and cross-bill of the bank were adopted by the Temporary Receiver, who intervened (85-88), as his pleading (88-89).

As has been pointed out, therefore, the pleadings adopted by the Receiver of the bank as well as the evidence introduced at the hearing showed affirmatively and conclusively that the Smyls were the owners of an interest in the property in suit.

With the record in this condition, the Smyls having defaulted to the Tudryck bill which specifically stated that no relief was requested against them, and with the pleadings adopted by the Temporary Receiver showing that the Smyls were the owners of an interest in the property, subject to the three (3) mortgages held by the Receiver as successor to the bank, the Receiver and the Tudrycks decided to settle their differences. The attorneys for the Tudrycks, and a new attorney who had not been in the case before, but who represented the Permanent Receiver, the latter never having been added, substituted or intervened as a party in accordance with the Michigan Practice, elected to execute a stipulation of settlement and enter a decree pursuant thereto.

These parties, disregarding all the pleadings and testimony, including the pleadings of the bank adopted by the Temporary Receiver when he intervened, and disregarding the documentary evidence introduced at the trial, all of which disclosed the interest of the Smyls in the property, stipulated in part as follows (98, 99):

> "That said defendants, Andrew Smyl and Victoria Smyl, as well as all other parties to said cause, have no right, title or interest whatsoever in and to the said lands and premises, including hereditaments and appurtenances and minerals thereunder, and that all interest in said premises is held by said defendant and cross-plaintiff, H. L. Switzer, Receiver of said Sterling Bank of Sleeper and Chamberlain."
>
> "That decree submitted herewith may be signed and filed in said cause as a final decree entered pursuant to the testimony in said cause and agreement of said parties as evidenced by this stipulation."

The Smyls were strangers to this stipulation. They were not served with the cross-bill filed by the bank, the only proceeding claiming relief against them, and had no notice that their title to the property was to be adjudicated by the Court. They were paid nothing for their share of the property taken away by the court decree entered pursuant to the above stipulation. The decree provides, insofar as the Smyls are concerned, as follows:

> "IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Andrew Smyl and Victoria Smyl, cross-defendants, or either of them, have at the date hereof, no right, title or interest whatsoever in and to the premises herein involved, it being further ORDERED, ADJUDGED and DECREED that all their right, title and interest in and to said premises, and in any manner arising, and whether applicable to the lands herein involved, the hereditaments and appurtenances on the surface of said land appertaining thereto, or any coal and/or mineral, and/or other rights incident to said land, and under the surface thereof, did heretofore by reason of their sale of all their in-

terest therein, to Tony Tudryck and Mary Tudryck, his wife, cease and did become null and void and of no force and effect, the said Andrew Smyl and Victoria Smyl, his wife, being decreed at this date to have no right, title or interest whatsoever in and to the same."

We point out that the decree entered by the Court (100-104) and the stipulation signed by counsel for the Tudrycks and the Permanent Receiver (97-99) contain, to all intents and purposes, identical provisions. Neither instrument has any relation to the proceedings or the testimony in the case. There was not a single allegation in any pleading that the Permanent Receiver, or his predecessor in title, the bank, owned the property. In fact, every allegation in the pleadings is quite to the contrary. Nor is there one iota of testimony that either the Receiver or the bank at any time claimed ownership of the property.

These two parties, the Tudrycks and the Permanent Receiver, after the case had been partially tried, abandoned the lawsuit entirely. They used the court to put into effect a compromise settlement which was agreeable to them. This settlement included the taking of the property of the Smyls without compensation, without notice that their rights were to be put in issue, and wholly arbitrarily and without justification. In upholding this decree, and in finding that no constitutional questions were involved (281), we submit that the Michigan Supreme Court affirmed a decree taking Petitioners' property without due process of law.

This court has consistently held that a trial court, if it is to render a valid judgment or decree, must have (1) jurisdiction of the parties, (2) jurisdiction of the subject matter, and (3) the judgment or decree must be substantially responsive to the issues raised by the pleadings. *Reynolds vs. Stockton,* 140 U. S. 254.

The Michigan court did not have jurisdiction of the parties. The Smyls were not served in the cross-proceedings filed by the bank to foreclose the three (3) mortgages; although they were named in the cross-proceedings as parties defendant and were necessary parties thereto. The Michigan Supreme Court has previously held in an identical sit-

uation that a decree by a defendant against a co-defendant on a cross-bill which was not served on said cross-defendant is void. *Huebner vs. Winkowski*, 246 Mich. 77. Furthermore, the court did not have jurisdiction of H. L. Switzer, Permanent Receiver. Although the Temporary Receiver intervened, the Permanent Receiver did not. Neither was he added nor substituted as a party to the proceeding prior to the entry of the decree. (See Michigan Court Rule No. 49 covering the addition of parties, and Section 14019 of the Michigan Compiled Laws of 1929 covering intervention proceedings). The trial court acknowledged this defect in the proceeding and attempted to correct the same by entering a nunc pro tunc order on its own motion on April 26, 1946, (221-223) at the hearing of the motion of petitioners' to set aside the decree, substituting Switzer as a party. This proceeding occurred approximately six (6) years after the void decree was entered.

The Michigan court did not have jurisdiction of the subject matter included in the decree. The Tudryck bill asked for the cancellation of three (3) mortgages, including a deed in the nature of a mortgage. The cross-bill filed by the bank, and adopted by the Temporary Receiver as his pleading, asked for a decree against the Smyls and Tudrycks foreclosing these same three (3) mortgages. The sole subject matter of the original bill and the cross-proceeding before the trial court was the cancellation or foreclosure of the three (3) mortgages. At no place in the entire proceeding is a question raised as to the ownership of the property as between H. L. Switzer, Receiver, and the Tudrycks or the Smyls. This issue was first injected into the proceeding by the filing of a stipulation executed by only two of the parties, pursuant to which the decree was entered.

The decree was not responsive to any issues raised by the pleadings. This is self-evident from the fact that a decree was entered giving title to the property to Switzer, Permanent Receiver, an interloper, while the pleadings involved the mortgage obligations only.

Petitioners submit that the entry of a decree pursuant to a stipulation unrelated to the issues raised by the pleadings, and especially when not signed by one of the parties whose

property is taken away thereby, is not a proper exercise of judicial power. In *Muskrat vs. U. S.*, 219 U.S. 346, this court has said:

> "The judicial power, as we have seen, is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction."

In *Ochoa vs. Hernandez Y. Morales,* 230 U. S. 139, this court has said:

> "Without the guaranty of 'due process' the right of private property cannot be said to exist, in the sense in which it is known to our laws. The principle, known to the common law before Magna Charta, was embodied in that charter (Coke, 2, Inst. 45, 50), and has been recognized since the Revolution as among the safest foundations of our institutions. Whatever else may be uncertain about the definition of the term 'due process of law', all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing."

The modern essentials of due process of law include (1) notice, (2) opportunity to be heard, and (3) an orderly course of procedure. Willis on Constitutional Law, p. 662.

Prior to the decision in the instant case, which appears to have ignored the due process of law provisions of the Federal Constitution, Chief Justice Campbell said in the case of *Hipp vs. Charlevoix County,* 62 Mich. 456:

> "The controversy, which is not in any proper sense a judicial one, is closed. The constitution has not empowered this court to settle controversies not judicial."

In *Goetz vs. Black,* 256 Mich. 565 at p. 569, the court states:

> "The Circuit Court is a court of record, acting through a judge or judges only in suits that are prop-

> erly begun by the filing of appropriate pleadings. The court can only act judicially. Judicial power is the power of the court to decide and pronounce its judgment and to carry it into effect between persons and parties who bring a case before it for decision. *Muskrat vs. U.S.*, 219 U.S. 346 (31 Supreme Court 250)".

The following are a few of the numerous cases decided by this Court which establish that a decree which is not responsive to the pleadings is void.

Reynolds vs. Stockton, 140 U.S. 254, involved a suit in New Jersey based upon a New York judgment. In affirming the New Jersey decision holding that the New York judgment was void, this court says (p. 265):

> "* * * The invalidity of the judgment depends upon the fact that it is in no manner responsive to the issues tendered by the pleadings. This idea underlies all litigation. Its emphatic language is, that a judgment to be conclusive upon the parties to the litigation, must be responsive to the matters controverted."
>
> "* * * the proposition suggested by those referred to, and which we affirm, is, that in order to give a judgment, rendered by even a court of general jurisdiction, the merit and finality of an adjudication between the parties must, with the limitations heretofore stated, be responsive to the issues tendered by the pleadings. In other words, that when a complaint tenders one cause of action, and in that suit service on, or appearance of, the defendant is made, a subsequent judgment therein, rendered in the absence of the defendant, upon another and different cause of action than that stated in the complaint, is without binding force within the courts of the same state; and, of course, notwithstanding the constitutional provision heretofore quoted, has no better standing in the courts of another state."

In *Standard Oil Company vs. Missouri*, 224 U.S. 270, an appeal from a Missouri judgment in a quo warranto proceeding, Justice Lamar says (Page 280):

"It is, of course, essential to the validity of any judgment that the court rendering it should have jurisdiction not only of the parties, but of the subject matter, Chicago B. & Q. Railway vs. Chicago, 166 U.S. 226, 234, 247 * * *

"The federal question is whether, in that court, with such jurisdiction, the defendants were denied due process of law. Under the Fourteenth Amendment they were entitled to notice and an opportunity to be heard. That necessarily required that the notice and hearing should correspond, and that the relief granted should be appropriate to that which had been heard and determined on such notice. For even if a court has original general jurisdiction, criminal and civil, at law and in equity, it cannot enter a judgment which is beyond the claim asserted, or which, in its essential character, is not responsive to the cause of action on which the proceeding was based.

"Though the court may possess jurisdiction of a cause, of the subject matter, and of the parties, it is still limited in the modes of procedure, and the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by the law. If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for a libel or personal tort, the court cannot order in the case a specific performance of the contract. If the action be for the possession of property, the court is powerless to admit in the case the probate of a will * * *. The judgments mentioned, given in the cases supposed, would not be merely erroneous: They would be absolutely void; because the court in rendering them would transcend the limits of its authority in those cases', *Windsor vs. McVeigh*, 93 U. S. 274, 282."

In *Radford vs. Myers*, 231 U. S. 725, the court says (Page 733):

"Judgments become estoppels because they affect matters upon which the parties have been heard, or have had an opportunity to be heard, but are not conclusive upon matters not in question or immaterial. *Reynolds vs. Stockton,* 140 U. S. 254, 268, 269."

Coe vs. Armour, 273 U. S. 413, was an appeal from a Florida judgment against a stockholder of a corporation rendered under a state statute. The court says (Page 424):

"To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits. *Rees v. Watertown,* 19 Wall. 107, 123.

"Nor can extra-official or casual notice or a hearing granted as a matter of favor or discretion be deemed a substantial substitute for the due process of law that the constitution requires. In *Stuart vs. Palmer,* 74 New York 183, 186 which involved the expense of a local improvement upon the lands benefited, but without notice to the owners the court said: 'It is not enough that the owners may by chance have notice, or that they may as a matter of favor having a hearing. The law must require notice to them, and give them a right to a hearing and an opportunity to be heard.' The soundness of this doctrine has repeatedly been recognized by this court."

For a comprehensive review of the leading cases supporting the above proposition we refer the court to *Clark vs. Savings Association,* 217 Federal 640.

The following excerpts from *Re-statement of the Law, Judgments,* are applicable to this case:

"Where a proper method of notification is not employed, the judgment is void, and not merely subject to reversal. An action cannot be maintained upon it, and the original cause of action is not merged in it. The rendition of such a judgment is subject

to reversal by the Supreme Court of the United States." Section 6A.

"*Requirement that judgment be within the issues.* Even though the state has jursdiction over the parties and even though the court is one of competency to render the judgment, a judgment by default is void if it was outside the cause of action stated in the complaint and if the defendant was not given a fair opportunity to defend against the claim on which the judgment was based. Such a judgment is subject to collateral attack, * * *" Section 8C.

CONCLUSION

In conclusion petitioners Smyl submit that this decree is void for the reason that same constitutes a violation of the due process of law clauses of the federal constitution. In the first place, it is void because the petitioners Smyl were not served with the cross-bill of complaint filed by the Sterling Bank, predecessor in title to the permanent receiver, and they were therefore not proper parties to the proceeding, and had no notice that their rights were to be put in issue. In the second place, the decree is wholly irregular and void for the reason that it was rendered in favor of a permanent receiver, who was a stranger to the proceeding, and without any notice to these petitioners that he had any claims against them. In the third place, the decree is void for the reason that it was entered upon a stipulation which purported to affect their property rights but to which they were not parties and of which they had no notice. In the fourth place, the entry of the decree pursuant to a stipulation is a void exercise of judicial power. The court exceeded its judicial powers in entering a decree of any sort in a proceeding which was not judicial in nature, and which was not based upon issues tendered by pleadings in accordance with the rules and practices of the court. In the fifth place, the decree is not responsive to any issues tendered by the pleadings, violates the constitutional rights of these parties, and is therefore void. The only issue tendered by any pleading under which the receiver

could conceivably claim any rights is the cross-bill to foreclose the three mortgages filed by the Sterling Bank, his predecessor in title. There is no pleading on file whereby the receiver or his predecessor in title claimed ownership of the property as against the Smyls. It follows under *Reynolds vs. Stockton, supra,* that the decree is void.

RELIEF SOUGHT

The order of the Supreme Court of the State of Michigan affirming an order of the Trial Court denying appellants' petition to set aside and vacate the stipulation and decree in question should be reversed, and the Writ of Certiorari issue as prayed for in application here filed, in order that all matters involved may be properly before this Court presented, should issue.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 710

ANDREW SMYL and VICTORIA SMYL,
his wife,
Petitioners,

vs.

JOSEPH MARTIN, Receiver of the Sterling Bank of Sleeper and Chamberlain, et al,
Respondents.

RESPONDENT'S BRIEF URGING THAT CERTIORARI BE DENIED

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AMERICAN BRIEF AND RECORD CO., GRAND RAPIDS, MICHIGAN

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

BRIEF FOR RESPONDENT IN OPPOSITION

(Figures in parentheses refer to pages of printed record unless context clearly indicates otherwise)

NOTE

Petitioners supplement to the Record in the Michigan Supreme Court is pages 271-282. This results in a duplication of page numbers in this record.

The record before the Michigan Supreme Court consists of two volumes, namely:

"Record on Appeal" pages 1 to 270.
"Volume of Exhibits" pages 271 to 534.

To save confusion, we add "Supplement" when referring to matters in the Supplement to the State Record.

SAME QUESTIONS AS PRESENTED IN TUDRYCK PETITION, NO. 709

The petition of Smyls presents the same questions and arises out of the same cause of action referred to in the petition for writ of certiorari filed by Tony Tudryck and Mary Tudryck, No. 709, now pending before this court. Copy of our brief in said cause No. 709 is being served upon attorneys Robert C. Winter and J. P. Mikesell, counsel for Smyls.

To avoid repetition, we ask the court to consider our brief in cause No. 709 as a part of this brief in opposition to the Smyl petition.

We will include in this brief only such statement of facts and of law as pertain directly to the questions asserted by Andrew Smyl and Victoria Smyl.

OPINION BELOW

The opinion of the Supreme Court of the State of Michigan (275-281 Supplement) decided January 6, 1948, is reported in 320 Michigan 99. The motion of Andrew Smyl and Victoria Smyl, present petitioners, filed August 16, 1944, to vacate decree entered in the state trial court on January 25, 1940 (125) as well as the motion to vacate the same decree filed October 31, 1944, by Tony Tudryck and Mary Tudryck, plaintiffs in the original cause (125), were heard as one case in the Michigan Supreme Court, and are therefore covered by the one opinion of the Michigan Supreme Court. Opinion of the state trial court (Circuit Court for the County of Arenac, Michigan, in Chancery) appears at page 207 of the Record.

CHALLENGE OF GROUNDS OF JURISDICTION

We urge that there was no basis for the filing of the present petition for the following reasons:

A.

That the judgment and decision of the Michigan Supreme Court was based upon Non-federal grounds (281 Supplement).

B.

That the Michigan Supreme Court found no State or Federal Constitutional questions involved in said cause (281 Supplement).

C.

This court has no jurisdiction based upon Section 237 (b) of Chap. 229, 43 Stat. 936 as amended by Congress (page 7 of Petition) for the reason that this suit does not infringe upon *any title, right, privilege or immunity* specially set up or claimed by said petitoners under the constitution, * * * or statute of * * * the United States. The 14th amendment to the Federal constitution has reference to state action exclusively, and is not applicable in the instant case which involves only claims of private individuals.

D.

That the findings of the Supreme Court of Michigan on the question of jurisdiction of the subject matter and of the parties, application and construction of rules of practice in said state, application of the doctrine of laches, determination of facts, application of the local rules limiting the time in which applications for rehearing must be filed, and application and construction of the statute of amendments of said state and prior decisions of said state Supreme Court, are all binding upon the United States Supreme Court and are not proper questions which this court will review.

E.

The petition does not present for review a *Federal question of substance* as required by subdivision a, of Paragraph 5, Rule 38 of Rules of Supreme Court of United States. The questions urged by the petitioners, when viewed in light of the record in this case, are *frivolous* and entirely *lacking in substance or color of merit.*

QUESTIONS PRESENTED BY PETITION

That the order of the trial court denying said motion, together with the decision of the Supreme Court of the State of Michigan, violates the 14th Amendment of the Constitution of the United States (*due process of law* — and — *equal protection of the laws* — (page 8 of the Petition).

COUNTER-STATEMENT OF FACTS

The Statement of Facts as set forth in the Petition for Writ of Certiorari is *grossly* inaccurate and erroneous. Material facts are omitted and matters of argument are made to appear as facts. Statement of Facts as set forth in the opinion of the Michigan Supreme Court is correct. As a part of this brief we adopt Counter-Statement of Facts contained in our brief in opposition to Tudryck Petition, No. 709. In addition thereto we note the following facts pertaining to the questions asserted by Smyls.

Tudrycks' bill of complaint contained the following allegations in support of their ownership of said property, namely:

> "That on the 1st day of March, A. D. 1934, and for some considerable time prior thereto, your plaintiffs *were the owners of the fee* * * *" of said premises. (Par. I, R. 5).
>
> "That on the 22nd day of October, A. D. 1923, at the time of the purchase of the sixty acre parcel of land in preceding paragraph described, *your plaintiffs, together with the then joint owners of said farm premises,* Andrew Smyl, also known as Andrew Smaiel, and Victoria Smyl, also known as Victoria Smaiel, his wife, were jointly and severally indebted unto the defendants * * *" (Par. III, R. 6).
>
> "Your plaintiffs further show that subsequent to the 22nd day of November, A. D. 1924, your plaintiffs herein, with the full knowledge of said defendant J. O.

Mutch, as cashier of said bank and of the said bank so legally constituted as aforesaid, *did purchase from the said defendants Andrew Smyl, also known as Andrew Smaiel, and Victoria Smyl, also known as Victoria Smaiel, his wife, all their right, title and interest in and to the lands and premises hereinbefore described,* your plaintiffs herein from then hitherto, and except as hereinafter in this Bill of Complaint set forth, having themselves occupied and farmed said lands" (Par. VI, R. 10-11).

"That your plaintiffs herein, *as such sole owners* of said land premises, so then consisting of one hundred seventy acres of land, on the 4th day of January, A. D. 1930, made sale of thirty acres of said land to one Stanley Niedwicki and wife, * * *" (Par. VII, page 11).

"Your plaintiffs further show that from the time of their first acquiring possession of the farm lands in this bill of complaint described, up to and including the year 1927, your plaintiffs, *first together with said defendants Smyl, and subsequently alone, used, had and occupied and farmed said lands,* * * *. That both prior and subsequent to 1927 *plaintiffs* did borrow divers sums of money from said bank for purchase of livestock, equipment, etc., evidencing same by promissory notes. That all of said obligations were fully and completely paid and discharged. * * *" (Par. VIII, R. 12).

"And your plaintiffs here join in this proceeding defendants Andrew Smyl, also known as Andrew Smaiel, and Victoria Smyl, also known as Victoria Smaiel, his wife, against whom no personal relief is sought except that the deed which they and your plaintiffs did at the time of their purchase from said defendants Smyl of the latters' interest in said premises aforesaid and which said deed your plaintiffs did subsequently at the request of said defendant J. O. Mutch deliver over unto him as cashier of said defendant bank, so legally constituted as aforesaid, be by decree established as having been given as security

only, *in order that the record title of your plaintiffs in said lands be fully established.*" (Par. XIV, R. 22).

Tudrycks prayed for the following relief:

A. Answer by all of the defendants including Andrew Smyl and Victoria Smyl. (Par. A., R. 22).

B. Injunction as to Smyls and other defendants. (Par. B. R. 23).

E. That an accounting be decreed and that the said defendants "be required to come unto a true, full and complete accounting with your plaintiffs for each and every item of obligation and credit existing between them and your plaintiffs, *and whether arising during the time that your plaintiffs and said defendants Smyl were joint owners of the premises in this cause involved, or subsequent thereto.*" (Par. E., page 24).

F. That the court decree that all indebtedness owing by plaintiffs to said bank be fully satisfied and discharged and that the court determine the indebtedness to plaintiffs for damages and that execution issue therefor. (Par. F., R. 25).

G. "That each and every cloud upon the title to the premises in this cause involved, by reason of the conveyances now of record, *or not of record,* be decreed removed therefrom, and that this Court decree that your *plaintiffs herein be the owners of the fee of the premises* in this cause involved, free, clear and discharged of all obligations unto said defendants Harvey A. Chamberlain, J. O. Mutch * * *." (Par. G., R. 25).

H. Prayer for further and different relief. (Par. H., R. 26).

Circuit Court summons was directed to Andrew Smyl and Victoria Smyl and the other defendants (32). Circuit Court injunction was directed to Andrew Smyl and Victoria Smyl and other defendants (39).

On August 16, 1938 the following papers were personally served upon Andrew Smyl and Victoria Smyl:

(a) Summons, (35-36).
(b) True copy of Bill of Complaint (36-37).
(c) Injunction (44).

Not having appeared, default of Andrew Smyl and Victoria Smyl was regularly entered by Harry J. Lippman, attorney for Tudrycks on October 21, 1938, as will appear from the following:

(a) Affidavit of non-appearance (82);
(b) Order pro-confesso (84);
(c) Affidavit of regularity (83).

On June 14, 1939, this case came on for trial before Hon. John C. Shaffer, Circuit Judge.

Appearances were as follows:

Mr. Harry J. Lippman, attorney for Tony Tudryck and Mary Tudryck.

Mr. Harry E. Converse appearing for J. O. Mutch and Harvey A. Chamberlain.

Yeo and Bilitzke, by Mr. Bilitzke, appearing for the Receiver of the Sterling Bank of Sleeper and Chamberlain. (311).

Opening statement was made by attorney Harry J. Lippman in behalf of Tudrycks (329-339).

Opening statement was made by Mr. Bilitzke in behalf of the receiver (339-343).

Attorney Harry J. Lippman then called J. O. Mutch as a witness for cross-examination under the statute (344-504).

Andrew Smyl is Tony Tudryck's brother-in-law (292). He was present upon the trial with Tony Tudryck actively assisting Harry J. Lippman in the presentation of testimony, all of which appears undisputed from the following affidavit of Harry J. Lippman.

"Deponent (Harry J. Lippman) further shows that trial of the matters and things in this cause involved was had in open court at Standish, Michigan on the

14, 15 and 16th days of June, 1939, he this deponent on that occasion having again talked to said defendant, Andrew Smyl, with reference to his alleged sale of interest in the land in question to the said Tudrycks, this deponent, on the trial of said cause having fully questioned the said defendant, Mutch, in reference thereto, the said defendant Andrew Smyl, during such questioning, being in Court, and he during such examination having made suggestion of certain questions in reference thereto to this deponent which questions this deponent did accordingly ask of the said Mutch" (167).

After Harry J. Lippman had completed his accounting he proposed settlement to said receiver (157). The matter was reported to the trial judge for confirmation. Stipulation embodying the terms of settlement was attached to the Receiver's petition asking authority to make same (516). The stipulation provided:

> "4. That decree submitted herewith may be signed and filed in said cause as a final decree entered *pursuant to the testimony in said cause and agreement of said parties* as evidenced by this stipulation" (99).

The receiver immediately took possession of the real estate and premises and exercised all acts of ownership in relation to same and paid taxes (133).

After Tudrycks had made settlement with the Receiver they, by attorney Harry J. Lippman, pursued their action against J. O. Mutch, individually, by filing in Arenac Circuit Court suit for damages same being case No. 874, entitled, Tony Tudryck, Plaintiff, vs. J. Otis Mutch, Defendant (174). Judgment was taken against J. O. Mutch by default based upon the testimony of Andrew Smyl, Tony Tudryck and others (281-300).

Oil was discovered upon said property in year 1944 (134). Thereafter Smyls on August 16, 1944, by J. P. Mikesell, their attorney, filed motion to vacate said decree (107). Joseph Martin, Receiver, then filed a motion to dismiss the said motion of Smyls to vacate decree (129).

Said motion, as well as similar motion filed by Tudrycks, came on for hearing before the Hon. John C. Shaffer, Circuit Judge on December 12, 1944. In addition to the several exhibits offered and received in evidence on the part of the receiver, attorney Harry J. Lippman submitted in open court and filed with the clerk of said court the following affidavits in opposition to said motion by Smyls namely:

1. Affidavit of Thomas Olszynski (168).
2. Affidavit of Harry J. Lippman (164).

Copies of same were served upon attorney Mikesell by Mr. Lippman (185). No affidavits were filed by either Andrew Smyl or Victoria Smyl in opposition to affidavits submitted by Harry J. Lippman.

The charge that Smyls were never served with process was withdrawn by attorney J. P. Mikesell in open court at the time of the hearing on said motion (See opinion of Trial Court, R. 208).

ARGUMENT

I.

Statements in Smyls' motion and accompanying affidavits praying for vacation of decree are false as shown by previous testimony and undisputed evidence.

The attempt of Smyls by their motion and affidavits (107-119), to challenge the validity of the final decree entered in said cause by (a) denying service of process and bill of complaint by Harry J. Lippman; (b) denying knowledge of the Tudryck suit in Chancery against them and the result of said suit, was a complete failure.

The unreliability of affidavits of said parties is best illustrated by an analysis of the claims made in their affidavits against the undisputed facts shown by this record.

Service of Process:

The affidavit of Andrew Smyl denies that he was served with summons and bill of complaint by Harry J. Lippman. (Par. 2 and 3, R. 108). He states:

> "That neither this deponent nor his said wife were ever served with any summons or bill of complaint and received no notice of said proceeding whatsoever * * *" (Par. 7, R. 113).

Mrs. Smyl makes the same statement in her affidavit (117) and states: That said Smyls did not meet Harry J. Lippman until Sept., 1940, when Mr. Smyl was served with subpoena in law case No. 874, entitled, *Tony Tudryck vs. J. Otis Mutch.* That Harry J. Lippman had never been to their farm prior thereto. "That neither Harry Lippman nor Tony Tudryck at any time mentioned said Chancery proceeding purporting to affect Smyls' interest in said property" (Par. 8, R. 114).

That was a direct attack upon the affidavit of service of Harry J. Lippman.

To meet that attack, Harry J. Lippman submitted and filed in open court his affidavit in direct denial of those charges. The following is from his affidavit:

1. That on August 16, 1938, he, in the presence of Tony Tudryck and Thomas Olszynski, served the summons and copy of bill of complaint upon Andrew and Victoria Smyl.

2. That he (Lippman) had a

> "lengthy conference with reference to the various matters in this suit involved in the living room of the homestead premises of the said Smyls, and the said Smyls on that occasion fully corroborating the claims of the said Tony Tudryck, that they years prior thereto sold and conveyed all their interest in the farm lands in question to the said Tudrycks, the said Smyls in their explanation of same to this deponent, having talked both in English and Polish through interpreter, and this deponent on that oc-

casion having been advised that in consummation of the transaction, the said Tudrycks and the said Smyls had visited the said J. O. Mutch, at the Bank at Sterling, Michigan, and the said Mutch on that occasion at their request, having prepared a Quit Claim Deed, wherein and whereby the said Smyls did sell and convey all their interest in the lands in question to the said Tudrycks, which deed was by the said Smyls duly executed and acknowledged, which deed was then left with the said Mutch for the purpose of recording.

"Deponent (Lippman) further shows that not only was the transaction of sale by the said Smyls to the said Tudrycks fully explained to him as herein set forth, but in addition thereto, the said Smyls did acknowledge that on that day, as consideration for such execution, they did receive from the said Tudrycks, the sum of One Thousand ($1,000.00) Dollars, which they, the said Tudrycks, for that purpose, on that occasion did borrow through the said Mutch from that said bank.

"Deponent (Lippman) further shows that all statements contained in supporting affidavits to the petition of defendants, Smyl, to the effect that this deponent did serve certain witness subpoena upon the defendants, Smyl, in the latter part of August or the early part of September, 1940, or for that matter at any time, are wholly denied, this deponent showing that he never at any time served witness subpoena of any kind in any proceeding upon the said defendants Smyl, or either of them, this deponent particularly showing that he was not present at Standish, Michigan, or anywhere in its immediate vicinity during the latter part of August or the early part of September, 1940, there being no trial pending then to be heard.

"Deponent (Lippman) further shows that the only time he ever served any papers of any kind upon defendants Smyl was the day of his institution of the within suit, to-wit: August 16th, 1938, as aforesaid, the papers then served as explained herein being

copies of Chancery Summons, and copies of Bill of Complaint.

"Deponent (Lippman) further shows that trial of the matters and things in this cause involved was had in open Court at Standish, Michigan on the 14, 15 and 16th day of June, 1939, he this deponent on that occasion having again talked to said defendant, Andrew Smyl, with reference to his alleged sale of interest in the land in question to the said Tudrycks, this deponent, *on the trial of said cause having fully questioned the said defendant, Mutch, in reference thereto, the said defendant, Andrew Smyl during such questioning, being in Court, and he during such examination having made suggestion of certain questions in reference thereto to this deponent which questions this deponent did accordingly ask of the said Mutch.*

"Deponent (Lippman) further shows that in his opinion, the said defendants, Smyl herein, have no right, title or interest in the premises in this cause involved, having parted with their entire interest in same to the plaintiffs herein many years in advance of the institution of the within suit, and present claims merely being advanced in a vain attempt to acquire some benefit from the oil and gas recently discovered at said lands" (165-167).

Harry J. Lippman then submitted and filed in open court the affidavit of Thomas Olszynski. The following is from said affidavit:

1. That he (Olszynski) is well acquainted with Tony and Mary Tudryck and Harry J. Lippman, and on August 16, 1938, accompanied Tudryck and Lippman to Gladwin and Standish for the purpose of instituting the suit against Mutch and others.

2. That they drove to the farm of Smyls at which time Lippman in his presence and in the presence of Tudryck, did serve Andrew Smyl and wife with Chancery summons and Bill of Complaint in that case.

3. That on said occasion

> "said Smyls, particularly the said Andrew Smyl, did advise the said Lippman, both in English and in Polish, through this deponent (Olszynski) as interpreter, that years before he had sold all his interest in the farm lands in question to the said Tudrycks, he on that occasion having explained to this deponent and the said Lippman, that for the purpose of carrying that sale into effect, he together with the said Tudryck had visited the said Mutch at the bank at Sterling, at which place the said Mutch did at their request prepare a Quit Claim Deed of their interest in the lands to the said Tudrycks, they having further advised that they did execute that deed and did leave said deed with the said Mutch who promised to record same" (168).

No counter-affidavits were filed by either Andrew or Victoria Smyl in denial of the facts set forth in the Lippman and Olszynski affidavits which were introduced in evidence upon the hearing of the Motions to Vacate said Decree in the state trial court (185).

Confronted with those affidavits, attorney Mikesell, attorney for the Smyls withdrew the charge that Smyls were never served with process.

Same is noted in the opinion of the Court:

> "The charge that defendants Smyl were never served with process was withdrawn in open court" (208).

Smyls' Affidavit that he had no knowledge of the original Tudryck suit is false.

Paragraph 8 of Smyls' affidavit in support of their motion states:

> "* * * that neither said Harry J. Lippman nor Tony Tudryck at any time mentioned said Chancery proceeding purporting to affect the interests of this deponent and his wife in the property described in the decree entered herein; * * *" (114).

Paragraph 7 states that the only paper ever served upon said Smyls was a subpoena in law case No. 874, served in September, 1940, and

> "* * * that said occasion in 1940 was the first time that either this deponent or his said wife had ever seen said Harry J. Lippman; that said occasion was approximately two years after the alleged service of process and service of the bill of complaint on file herein; that said Harry J. Lippman had never met or seen deponent or his wife or been at their farm prior thereto" (Par. 7, R. 114).

Smyl was present in State Trial Court assisting Tudryck and Attorney Harry J. Lippman during the cross-examination of J. Otis Mutch, cashier of said bank.

The record shows that Smyl was present in the State Trial Court when the testimony was taken and that he assisted Tony Tudryck and Harry J. Lippman in suggesting questions to be put to J. Otis Mutch. These facts appear undisputed from the following:

(a) Affidavit of Harry J. Lippman (167).
(b) Testimony of Tony Tudryck and Andrew Smyl taken in the law action of *Tudryck vs. Mutch* case No. 874 (272).
(c) Affidavit of Celia Drapkowski (150).

Lippman Affidavit States:

> "Deponent (Lippman) further shows that trial of the matters and things in this cause involved was had in open Court at Standish, Michigan on the 14, 15 and 16th days of June, 1939, he this deponent on that occasion having again talked to said defendant, Andrew Smyl, with reference to his alleged sale of interest in the land in question to the said Tudrycks, this deponent, on the trial of said cause having fully questioned the said defendant, Mutch, in reference thereto, the said defendant, Andrew Smyl, during such questioning being in Court, and he during such examination having made suggestion of certain questions in refer-

ence thereto to this deponent which questions this deponent did accordingly ask of the said Mutch" (167).

Excerpts from Tudryck and Smyl Testimony:

"WITNESS TONY TUDRYCK:

"Q. Who was Mr. Smyl?
A. It is my brother-in-law.
Q. Your brother-in-law; he also has a farm near Sterling has he not?
A. Yes, sir" (283).

"Q. Now, then, you were in court last June when Mr. Mutch testified in another case?
A. Yes, sir.
Q. You were here?
A. Yes.
Q. You heard him tell the court that he had put the people in there without asking you about it did you not?
A. Yes, sir" (284).

"Q. Just before the last trial you and I went out to the farm and looked it over, didn't we?
A. Yes, sir" (285).

"Q. You heard him testify to that here in court last June, did you?
A. Yes, sir.
Q. As the owner of that place, what would you say was the fair reasonable rental for that seven acres for the season?
A. That is just broken, it was good ground, that ground was worth ten dollars an acre" (286).

"Q. Now, Mr. Tudryck, when you were in court last June, you remember I asked Mr. Mutch in reference to a bonus check that you received from the military service, that you claim that you turned over to him?
A. Yes, sir.

Q. You remember his having said that he did not remember anything about it?

A. Yes, sir.

Q. You recall also that investigation that he made in open court at that time of the bank's books and records?

A. Yes, sir" (287).

"WITNESS ANDREW SMYL:

"Q. Do you know the farm he had?

A. Why, yes, I know" (293).

"Q. When Tony left here did he tell you to look after the property, and the rental of it?

A. Yes, sir" (293).

"Q. This farm that Tony had out there was a 140-acre farm, is that right, and these horses that Mr. Mutch had out there were permitted to pasture on this farm?

A. Yes, sir" (296).

"Q. Did you ever tell Mr. Mutch that he could move that off the property?

A. No, he did not even ask me about it.

Q. *You heard him admit here in court last June* —

A. Yes, sir.

Q. That he took it over to his farm without ever asking anybody, and his excuse was he intended to bring it back, and he brought it back while the trial was in progress?

A. Yes, sir" (298).

"Q. In your opinion what was the fair and reasonable rental value of this house of Tony's from the time he left there until the house burned down; how much a month?

A. Around $15 a month, it was in good shape, 5 rooms and basement; everything was in good shape" (299).

"Q. These people that Mr. Mutch put in there were in there for about 13 months up until the time of the fire?

A. Yes, they were.

Q. *You heard him say that in court here last June?*

A. 12 or 13 months" (299).

Celia Drapkowski Affidavit States:

"Deponent (Drapkowski) further shows that on the 14th day of June, A.D. 1939 she did drive the said Harry J. Lippman to the City of Standish, Michigan, for the purpose of attending the trial of this cause, she being in attendance with him on such hearing the entire day of the said 14th of June, 1939, both the said Tony Tudryck and the said Andrew Smyl, whom this deponent did then meet, being present in Court, and this deponent here showing that on that occasion, during the examination by the said Lippman of witness J. O. Mutch, in reference to the sole ownership of the farm lands in question by the said Tudrycks, both the said Tony Tudryck and the said Andrew Smyl did assist the said Lippman by suggesting questions through this deponent to the said Lippman in reference to the said Smyls having conveyed all their interest in the said lands to the said Tudryck, and in reference to the said witness, Mutch, himself, having drafted and caused the execution of the quit claim deed in reference thereto" (153-154).

II.

Effect upon Smyls of permitting the entry of their default by plaintiffs Tudrycks.

The Smyls were personally served with the Circuit Court Summons (35), copy of the Tudryck Bill of Compaint (37), and copy of the Injunction (44). By their failure to appear and deny the allegations of the Tudryck bill of complaint they admitted every averment in said Bill of Complaint, and the trial court had full authority to enter decree against Smyls in conformity with the allegations of the bill of complaint.

The Michigan Supreme Court said:

> "By their failure to appear and deny the allegations of the original bill, the Smyls admitted all the well pleaded averments thereof. One of these admissions was that they had no further interest in the subject matter of the litigation and that the accounting between the Tudrycks and the bank and others was none of their concern. We find nothing in the decree outside the scope of the bill of complaint; nor is a cross-bill requisite to granting affirmative relief to a defendant in an accounting suit. Long v. Earle, 277 Mich. 505, 527; and see 1 Am. Jur. p. 307, Sec. 63, therein quoted" (279 Supplement).

That has been the rule in Michigan for many years, as shown from the following state decisions:

> "The effect of permitting a judgment creditor to take a bill of complaint as confessed for want of an answer, is *to admit every averment in the pleading and to authorize a decree based thereon without requiring supporting proofs.*"
>
> *St. Louis Hoop and Stave Co. vs. Danforth,* (1910) 160 Mich. 226.

Bonnici vs. Kindsvater, 275 Mich. 309;
Swetland vs. Swetland, 3 Mich. 482;
Great Hive, Ladies of the Maccabees vs. Supreme Hive, Ladies of the Maccabees of the World, 129 Mich. 324;
Gage vs. Kaufman, 133 U. S. 471.

Decree Quieting Title as to Smyls Conforms to the Bill of Complaint.

Paragraph VI of the Tudryck bill of complaint alleged the purchase by Tudrycks of the Smyls' interest (10).

The decree herein, follows the language of the said bill of complaint and quiets title as to Smyls, concluding with the following:

(Decree):

"* * * that all their right, title and interest in and to said premises, and in any manner arising, and whether applicable to the lands herein involved, the hereditaments and appurtenances on the surface of said land appertaining thereto, or any coal and/or mineral, and/or other rights incident to said land, and under the surface thereof, did heretofore by reason of their sale of all their interest therein, to Tony Tudryck and Mary Tudryck, his wife, cease and did become null and void and of no force and effect, the said Andrew Smyl and Victoria Smyl his wife, being decreed at this date to have no right, title or interest whatsoever in and to the same" (103).

The decree was in conformity with the allegations of the Tudryck bill of complaint, taken as confessed as to Smyls, and was supported by the testimony of J. Otis Mutch submitted to the court by attorney Harry J. Lippman, counsel for Tudrycks. That part of the testimony of J. Otis Mutch is shown hereafter in this brief.

III.

Decree quieting title as to Smyls based upon their default entered after personal service of process, supported by testimony submitted in open court.

Tudrycks in their bill of complaint had alleged in great detail every fact commencing with the time the property was acquired — how it was acquired — purchase of Smyls' interest — transactions with the bank, including mortgages, etc. — and then upon the trial called as a witness Avis Black, Register of Deeds who testified in support of the record title as set forth in Tudrycks' bill of complaint (313-328).

J. Otis Mutch, cashier of said bank, was then called as a witness by Tudrycks. The state trial court listened to testimony in behalf of Tudrycks for two days.

The following is from the record of the trial:

From opening statement of attorney Lippman:

"In 1924 about a year later Tony Tudryck and his wife and Smyl and his wife decided that they would sever their relations; it was talked over with Mr. Mutch and the deal, whereby Tudryck and his wife bought out Smyl and his wife, was handled by Mutch, the deal arranged by Mr. Mutch and the money for that purchase which was $1,000.00, was borrowed from the bank and handled by Mr. Mutch, and all these four parties met at the bank on that day in 1924, and Mr. Mutch drew up these papers himself on the typewriter in the back office of the bank, drew a mortgage in the sum of $1,000.00, which he caused not only Tudryck and his wife to sign, but also Smyl and his wife to sign; he drafted a deed to this 170 acres of land, which he caused Tudryck (Smyl) and his wife to sign, and which deed ran to Tudryck and his wife, and which deed we will show you is not of record in this county. He not only drafted the documents I have referred to on that occasion, but in addition he caused Tudryck and his wife and Smyl and his wife to sign a deed, a warranty deed to the bank conveying to the bank this 170 acres of land, and which deed now appears to recite on that occasion that they were indebted to the bank the sum of $5500.00 some dollars. We will show you from our proof that that deed which I now refer to, prepared by Mr. Mutch, was not read to these people, that no statement was made to them anywhere in the deed, or the reference to any amount of the mortgages, but that merely on that occasion, the occasion when Tudryck and his wife bought out Smyl and his wife, and borrowed $1000.00 from the bank for that purpose, and on that occasion Mr. Mutch had these four sign a mortgage for $1,000.00, and on that occasion he advised Mr. Tudryck and Mr. Smyl that the bank would have to have additional security, that they would have to have a deed which they would hold at the bank without recording it, and this deed, which took place on the day that Smyl and his wife sold out to Tudryck and his wife

was signed at the behest of Mr. Mutch by these four persons. It will also appear that that deed is on record, not as a mortgage, but as an absolute conveyance" (331).

"We will show you further Tony Tudryck and his wife from the time they took possession of the farm first when they were partners with Smyl and his wife then and subsequently alone needed money to run their farm * * *" (332).

From Testimony of J. Otis Mutch:

J. Otis Mutch testified that at the time Tudrycks and Smyls separated in November, 1924, there was a further loan from the bank of $1000.00, which was paid to Smyls. $800.00 of that amount was in the form of certificate of deposit, Exhibit 30, payable to Mrs. Smyl (490, 416).

Mr. Mutch testified:

"Q. You knew at the time Tony Tudryck and Smyls borrowed this $1,000.00 of the bank for which Exhibit No. 5 was given, that these men were separating?

A. Yes, sir.

Q. Didn't you?

A. Yes, sir.

Q. You knew why that $1,000.00 was borrowed?

A. Yes, sir.

Q. Tell the court here why that $1,000.00 was borrowed?

A. Two families trying to live in one house never results peacefully; they did not agree on policies all the way through and had talked for some time it might be wise for them to separate, and then came to me and asked me on top of what they already owed to let them have another $1,000.00 to enable Mr. Smyl to go by himself, and that was the purpose of this third named mortgage.

Q. In other words, you knew that $1,000.00 was to be money that was to be paid by Tudryck and wife to

Smyl and wife for their interest in this farm on which you held the mortgages?

A. Yes, sir" (409-410).

Deed from Tony Tudryck and Mary Tudryck, husband and wife, and Andrew Smyl and Victoria Smyl, husband and wife, to J. O. Mutch as cashier of the Sterling Bank, dated November 22, 1924, recorded November 26, 1924 in Liber 56 of Deeds on page 616 (326).

Land contract dated March 1, 1937 between J. O. Mutch, Cashier of Sterling Bank of Sterling, Michigan, as seller, and Tony Tudryck and Mary Tudryck, his wife, as purchasers, (Exhibit A attached to Tudryck bill of complaint) (27).

Oil and gas lease by Tony Tudryck and Mary Tudryck, his wife, to Alvin Wilkinson dated August 24, 1935 recorded May 29, 1936 in Liber 5 page 91 (433).

The fact that in 1937 land contract was taken alone in the name of Tudrycks, and that Tudrycks thereafter alone executed oil and gas lease to Alvin Wilkinson, was additional proof in support of Tudrycks' bill of complaint that Smyls had sold their interest to Tudrycks and that Tudrycks were the *owners of the fee* of said premises.

IV.

Decree quieting title as to Smyls grants relief prayed for in bill of complaint.

Did not grant any relief prayed for in Cross-Bill.

The petitioners' brief argues that the decree entered in said cause was not responsive to any issues tendered by the pleadings. We have shown that the language of the decree quieting title as to Smyls, is in the same form and taken from the allegations of the bill of complaint. The decree in no manner was predicated upon the cross-bill of complaint filed by the bank.

Michigan Supreme Court.

The Michigan Supreme Court in considering that question said:

> "Smyl's argument that the decree should be set aside because neither he nor his wife was served with the cross-bill filed by the bank is beside the point. Had this cross-bill never been filed, the situation would be the same so far as the Smyls are concerned. When they were served in the action brought by the Tudrycks against the bank, they were charged then and there with notice that it was asserted that they had no interest in the subject-matter of the litigation. * * *" (279).

Provisions of cross-bill:

The cross-bill of complaint is a part of the Answer of Mutch and Chamberlain. It refers to the same deeds, mortgages, discharges of mortgages and other instruments alleged in the plaintiffs' bill of complaint (45-70).

Joining issue with the plaintiffs as to the extent of the alleged indebtedness due the bank, the cross-bill refers to the identical mortgages referred to in the bill of complaint, alleges that the same remain unpaid and prays for foreclosure of same. The cross-bill prays for the following relief:

1. An accounting covering all indebtedness (69).
2. That the defendants, *or some of them*, be decreed to forthwith pay said indebtedness (69).
3. In default of payment that said mortgages be foreclosed (69).
4. That the sale be under the direction of the court (69).
5. That upon sale possession be surrendered (70).
6. Prayer for deficiency decree (70).

No relief granted under the cross-bill:

Had any relief been granted under the cross-bill, there would be found in the decree the following:

(a) Finding of the court relative to accounting showing total indebtedness due the Receiver.

(b) Provision fixing the time for payment.

(c) Provision providing for foreclosure upon default.

(d) Provision authorizing deficiency decree.

None of these matters appear in the present decree. There was no testimony submitted in support of the allegations of the cross-bill of complaint. The testimony related solely to the matters alleged in the bill of complaint which was taken as confessed as to Smyls.

V.

Smyls' petition carries mis-statement by alleging that Tudrycks' bill of complaint prayed for no relief against Smyls.

In Smyls' brief herein, they state that the Tudrycks' bill of complaint specifically states that *no relief* was requested against the Smyls. (Page 2 of Brief).

They would have the court believe that Tudrycks joined Smyls as defendants for no purpose whatsoever.

Paragraph VI of the bill of complaint alleged the purchase by Tudrycks of the Smyl interest (10). The bill of complaint was seeking a personal decree against Harvey A. Chamberlain, and J. O. Mutch, agents for said bank for damages. (Par. F., 25). To show that *no such personal relief* was being sought against Smyls, Tudrycks allege in paragraph XIV that *"no personal relief is sought"* against said Smyls. The prayer asked for removal of all clouds "by reason of conveyances now of record *or not of record.*" (Par. G., R. 25-26). The only instrument not of record as shown by the opening statement of attorney Harry J. Lippman was the deed from Smyls to Tudrycks (331).

It also prayed that the court decree that plaintiffs *"be the owners of the fee"* of the premises involved (26).

This was an action *in rem* so far as it pertained to defendants Smyls. The following is the general rule with reference to the binding effect of Judgments in Rem:

> "Where a reasonable opportunity has been afforded to litigate rights of all persons in property before a court which has jurisdiction over the property, and the court has finally determined the rights in the property, the interests of the state and of the persons concerned require that the rights in the property shall not be litigated again by anyone."
>
> *Restatement of the Law,* page 12, under Judgments.

VI.

H. L. Switzer, Receiver, was not a stranger to this cause.

Petitioners argue that Switzer, Receiver, "was a stranger to the proceeding" (Page 19 of Brief). The record does not support that argument.

On November 5, 1938 order was entered and filed, signed by the Court, permitting said Joseph Martin, Receiver, *to intervene* and requiring him to file within 15 days his answer therein and to *"serve a copy thereof upon the attorney for plaintiff and also upon the attorney for all defendants who up to that time shall have appeared in said cause"* (88). Had defendants Smyls appeared, either in person or by attorney, they would have received service of such additional pleadings. Having defaulted in their appearance, (their default at that time had been regularly entered) (84), under Michigan practice, they were entitled to no further notice, and having been served with court summons, bill of complaint and injunction, were bound by all steps taken in the regular course of said suit.

34 *Corpus Juris,* 272 states the rule as follows:

> "But when a party has once been properly served with proper process, he is in court for every purpose

connected with the action, and cannot have the judgment vacated for the failure to notify him of intermediate steps in the case."

Stipulation consenting to the intervention of Receiver was signed by Harry J. Lippman, attorney for Tudrycks and Harry E. Converse attorney for J. Otis Mutch and Harvey A. Chamberlain (87).

No new issues were presented by reason of intervention of the Receiver. On November 7, 1938, the Receiver filed statement adopting as his pleadings those theretofore filed by J. Otis Mutch and Harvey A. Chamberlain (88).

The records in the general receivership cause contained the order appointing H. L. Switzer as Receiver to succeed Joseph Martin, and later the appointment of Joseph Martin, as Receiver to succeed H. L. Switzer (235, 528).

The file in the present case contains stipulation signed by Yeo and Bilitzke, attorneys for H. L. Switzer, Receiver, and attorney Harry J. Lippman for Tudrycks, consenting to an order adjourning the cause until the March 1939 term. Formal order was entered and filed based upon that stipulation (89).

The Michigan Supreme Court held in *Lapham vs. Tarabusi*, 247 Mich. 380, (1929) that a stipulation of continuance of a case constitutes an appearance.

As shown by the statements made upon the record in open court in conjunction with the trial of said cause, the trial court, as well as all attorneys of record, and Tony Tudryck and Andrew Smyl who were present in court, had notice and knowledge that the said property involved in said suit was in possession of said court through H. L. Switzer its receiver, and that Yeo and Bilitzke, attorneys for H. L. Switzer, Receiver, were then and there appearing in said cause in his behalf. In his statement in open court, which is a part of the record in this case, Mr. Bilitzke stated:

"Since that time a permanent receiver has been appointed and we stand here representing the permanent receiver by virtue of these pleadings" (312).

Attorney Harry E. Converse then made a statement withdrawing from active participation in said cause in behalf of Mutch and Chamberlain, acknowledging that the assets belonged to the Receiver (312).

Andrew Smyl was present in the trial court and actively assisted Tony Tudryck and attorney Harry J. Lippman (164-167) and had full knowledge that the property involved was then in the possession of the court through Switzer, Receiver, as its officer, and that Yeo and Bilitzke were attorneys for said Receiver.

The Smyls were bound, the same as all other interested parties, by all orders entered in the general receivership proceeding which then had possession of all the assets of said bank. There is no claim by the Smyls' motion or otherwise, that they were mislead by reason of change in the personnel of the receivers. Stipulation on file in this (Tudryck) cause, signed by Yeo and Bilitzke as attorneys for Switzer, Receiver, was notice to everyone of his appearance in said cause, and the records in the same court showed the appointment of Switzer as receiver. In 1899 the Michigan Supreme Court ruled in the case of *Ferguson vs. Wilson,* 122 Mich. 97:

> That an order that would have been granted as of course, may be treated as duly made.

The nunc pro tunc order entered by the trial court was *"Order of Substitution and Intervention"* (221).

The Michigan Supreme Court in applying the State Statute of amendments, and in approving the nunc pro tunc order of substitution of Switzer, Receiver, quoted with approval the case of *Daly vs. Hosmer Circuit Judge,* (1894) 102 Michigan, 392, 394, as follows:

> "It was a proper exercise of the court's discretion to permit the amendment of the verification and the filing of a replication after decree. Had the questions arisen upon the hearing, the power to do so would probably not have been questioned; but the questions were not raised then, and, when they were raised, were no more meritorious than they would have been

upon the hearing. There is no legal impediment, for courts may permit amendments to the pleadings or proceedings after judgment'' (280 Supplement).

Corpus Juris states the rule as follows:

"(Sec. 118) As a general rule it may be stated that property in the possession of a receiver is in *custodia legis;* that the receiver's possession is the possession of the court for the benefit of the party or parties ultimately entitled, nor is such legal custody altered by the removal of the receiver and the appointment of another in his place."

53 *Corpus Juris,* p. 95-96.

"The court will take *judicial notice of its own officers,* but not of those of another court. Norvell v. McHenry, 1 Mich. 227 (1849)."

"The Court itself has the custody of the property, the Receiver is but the court's creature."

Sec. 11 — *Clark on Receivers* — Second Edition.

"So long as property remains in the custody of the court, and is administered through the agency of a receiver, such receivership *is continuous and uninterrupted* until the court relinquishes its hold on the property though its personnel may be subject to change."

Sec. 299 — *Clark on Receivers* — Second Edition.

The Trial Court said:

"* * * To call Receiver Switzer a stranger to this proceeding is a misuse of that term and upon that premise to conclude that the decree is void for that reason is pure sophistry. * * *'' (208).

The Michigan Supreme Court said:

"Both appellants have suggested that State and Federal constitutional questions are involved, arguing that the decree exceeds the judicial power of the court

in purporting to give relief to a permanent receiver who was a stranger to the proceedings. The conclusion as thus stated is based upon a false premise. Both receivers, predecessor and successor, were officers of the court in which the cause was pending; and we have never understood that the authority of a successor receiver, as an officer of the court, can thus be challenged. * * *" (281 Supplement).

VII.

Smyl's testimony before the same trial court in law case No. 874, entitled "Tony Tudryck v. J. Otis Mutch."

Andrew Smyl alleges in his affidavit in support of his motion to vacate decree:

> "* * * that both Tony Tudryck and his said wife have executed an affidavit swearing under oath that neither of them have claimed any interest whatsoever at any time in the property of deponent and his wife, and likewise denying having knowingly made any claim that they had purchased the same, as is set forth in said paragraph 6, of the bill of complaint on file herein" (114).

No such affidavits were ever submitted to the court.

The assignment from Mary Tudryck to Tony Tudryck, attached to the declaration, dated April 1, 1940, contains the following:

> "* * * all my right, title and interest in and to the farm premises and any and all buildings thereon which my said husband and myself *did own prior to January 25th, A. D. 1940,* * * *" (179), (date of decree).

The declaration alleges that on February 15, 1937, Tudryck and wife *"were the owners of the fee"* of the property herein involved (175).

On September 11, 1940 default judgment was taken in that case against J. Otis Mutch based upon the testimony

of Ben Senski, Tony Tudryck, Andrew Smyl and Stanley Nedwitski (272).

If Smyls were part owners with Tudrycks of said property we would expect to find them parties plaintiffs to that suit, and interested in its result in their own behalf. On the contrary, we find Andrew Smyl testifying as a witness for Tony Tudryck in support of Tudrycks' claim for damages against J. Otis Mutch.

Andrew Smyl testified:

> "Q. You are Tony Tudryck's brother-in-law?
> A. Yes.
> Q. Do you know *the farm he had?*
> A. Why, yes, I know" (292-293).

> "Q. When Tony left here did he tell you to look after the property, and the rental of it?
> A. Yes, sir" (293).

> "Q. This farm that Tony had out there was a 140-acre farm, is that right, and these horses that Mr. Mutch had out there were permitted to pasture on this farm?
> A. Yes, sir" (296).

> "Q. In your opinion what was the fair and reasonable rental value of this house of Tony's from the time he left there until the house burned down; how much a month?
> A. Around fifteen dollars a month, it was in good shape, five rooms and basement; everything was in good shape" (299).

As a result of the testimony of Andrew Smyl and others, judgment was taken by default on September 11, 1940, against J. Otis Mutch in favor of Tony Tudryck in the sum of $4500.00. Smyls never asserted any interest in the said judgment taken by Tudrycks which has since been paid as the result of garnishment proceedings instituted by Tudryck which was sustained on January 6, 1948, in the case of Tudryck vs. Mutch, 320 Mich. 88.

Michigan Supreme Court:

Having reviewed that testimony, the Michigan Supreme Court found:

> "In the case of Tudryck v. Mutch, wherein Tudryck asserted sole ownership of the properties and the right to recover for damages caused by Mutch, Smyl testified at considerable length, without the slightest intimation, that he had any interest therein. His belated attempt, four years later, to assert such an interest must be precluded by the doctrine of laches and the provisions of Court Rules Nos. 28 and 48 (1933, as amended)" (280 Supplement).

VIII.

Where decree quieting title as to Smyls was entered pursuant to bill of complaint (No Relief having been Granted under the Cross-Bill) whether or not additional process should have been served upon Smyls, not necessary to decision of this case.

We have shown that the decree quieting title as to Smyls was based solely upon their allegations of the bill of complaint taken as confessed, and supported by the testimony taken before the trial judge.

In answer to Smyls' argument that an additional summons should have been taken out and served upon them in connection with the cross-bill of complaint, the Michigan Courts said:

Trial Court said:

> "The charge that defendants Smyl were never served with process was withdrawn in open court. This leaves the questions raised by the failure to serve defendants Smyl with either a copy of the bank's cross-bill or a summons upon the filing of such cross-bill.
>
> "The case nearest in point and relied on by the petitioners is Huebner v. Winskowski, 246 Mich. 77.

In that case the defendant contract purchasers had no means of knowing another defendant, Etrich, was attempting to enforce a lien against their property, and the court correctly held the subsequent decree was without binding force or effect. In the instant case defendants Smyl were advised by the bill of complaint that plaintiffs Tudryck, in 1924, had purchased from defendants Smyl all the latter's right, title and interest in and to the lands in question and claimed that defendants Smyl had no further interest in the premises; that the property had been deeded to the bank and that the bank later sold the property to plaintiffs on land contract; further, that various mortgages had been given to the bank with the lands in question as security, the bill then praying for an accounting between the parties and that plaintiffs be decreed to be the owners in fee of said lands. In the face of all those claims defendants Smyl were defaulted for failure to appear, thus admitting they had no further interest in the premises, and that any accounting concerning the several mortgages and the land contract and any payments made thereon or amounts found due thereon was a matter solely between plaintiffs and defendant bank. Such an accounting was had in open court and Andrew Smyl was present. The parties to the accounting reached an amicable settlement which provided for a conveyance to the bank by the plaintiffs upon certain payments by the bank to plaintiffs. Upon such a stipulation and the testimony so given in open court a decree was entered.

"Now it is true defendant bank filed a cross-bill praying for a foreclosure of its liens and that neither the cross-bill nor a summons taken out by virtue of such cross-bill was served upon defendants Smyl. Yet it is also true that every portion of the decree was within the claims asserted in the bill of complaint. So the assertions of petitioners that the decree took property of Smyls without due process become meaningless. Smyls had their day in court concerning the identical issues raised by the bill of complaint and settled by the resulting decree. The pres-

ence or absence of the cross-bill in this case has not affected the defendants Smyl; it has neither increased nor diminished their rights, nor has its filing been the means of taking away their property. In fact in an accounting suit a cross-bill is not a requisite to granting affirmative relief to a defendant. Long v. Earle, 277 Mich. 505 at 527-8. In my opinion the decree was substantially responsive to the issues tendered by the bill and answer. The Huebner case, supra, is not in point" (208-210).

Michigan Supreme Court said:

"Smyl's argument that the decree should be set aside because neither he nor his wife was served with the cross-bill filed by the bank is beside the point. Had this cross-bill never been filed, the situation would be the same so far as the Smyls are concerned. When they were served in the action brought by Tudrycks against the bank, they were charged then and there with notice that it was asserted that they had no interest in the subject matter of the litigation. The situation is unlike that presented in Huebner v. Winskowski, 246 Mich. 77, where one seeking to enforce a mechanic's lien filed a cross-bill and failed to serve those having an interest in the property" (279 Supplement).

Other Authorities:

In 1884 the Michigan Supreme Court announced the following rule:

(Syllabus):

"7. A suit and cross-suit constitute one cause, and notice of the suit is notice of the cross-suit also. So held in the case of a lis pendens filed in an original foreclosure suit, but not in a cross-suit for foreclosure; it was constructive notice to all the defendants."

S. C. Hall Lumber Co. vs. Gustin, 54 Mich. 625.

That same rule was followed in *Kingsbury vs. Buckner,* (1889) 134 U. S. 650:

> "* * * *no process is necessary to bring in the parties to the original bill;* but the cross-bill is to be regarded as an adjunct or part of the original suit, and the whole together as constituting but one case. * * *"

Kingsbury vs. Buckner, supra, is quoted with approval in the annotation appearing in 96 A.L.R. 991:

> "In some jurisdictions the strictness of the chancery practice has been relaxed, and process is not always required to be served on the complainant in a suit in equity on the coming in of a cross bill or an answer in the nature of a cross bill.
>
> "Thus in Fleece vs. Russell (1851) 13 Ill. 31, the court said: 'The Revised Statutes * * * provide for filing a cross bill, and the mode of proceeding upon it. Under * * * provisions of the statute, which have been passed since the decision in the case of Ballance v. Underhill (1842) 4 Ill. 453, no process is necessary to bring in the parties to the original bill; but the cross bill is to be regarded as an adjunct or part of the original suit, and the whole together as constituting but one case.' To like effect, see Reed v. Kemp (1855) 16 Ill. 445; Northern Trust Co. v. Sanford (1924) 308 Ill. 381, 139 N. E. 603. And see Kingsbury v. Buckner, (1889) 134 U. S. 650, 33 L. ed. 1047, 10 S. Ct. 638, applying the Illinois statute."

To the same effect 19 *American Jurisprudence,* Sec. 333, p. 235.

Said annotation appears following the case of *Frank M. Brand Adm. etc., vs. Gibson Trustee,* 96 A. L. R. 986. In that case, the West Virginia Supreme Court of Appeals reached the conclusion that the question of service under cross bill was not necessary to a decision in that case. It said:

(Syllabus):

"3. Necessity of process against plaintiff in original bill upon incoming of a cross bill or answer in the nature of a cross bill discussed but not decided because bill was a sufficient foundation for relief sought by defendant."

IX.

Laches and provisions of Michigan Court Rules limiting time for rehearings apply.

The Smyls having been served with process and copy of bill of complaint, together with injunction, had full knowledge of the commencement of this suit in 1938. Being relatives, they were very close to Tudrycks. The testimony taken in law case No. 874 (272) shows that when Tudryck went to Detroit to work he asked Smyl to look after the place for him while he was gone.

Andrew Smyl was in court when testimony was taken and assisted Mr. Tudryck and attorney Lippman in their conferences during the progress of the trial.

The Smyls filed no proceeding to contest the suit of which they had full knowledge, until 1944, after the property had become highly valuable because of the discovery of oil.

The Michigan Supreme Court correctly found that the rule of laches and the provisions of *Michigan Court Rule* 28, which limits the time for filing application for setting aside default and granting rehearing apply. The court said:

> "His (Smyl's) belated attempt, four years later, to assert such an interest must be precluded by the doctrine of laches and the provisions of Court Rules Nos. 28 and 48 (1933, as amended)" (280 Supplement).

That finding is in harmony with the rule as stated in *Restatement of the Law,* as follows:

"Equitable relief from a judgment may be refused to a party thereto if

(a) before or after the judgment was rendered the complainant or a person representing him failed to use care to protect his interests, or

(b) after ascertaining the facts the complainant failed promptly to seek redress."

Restatement of the Law, page 621 under Judgments.

X.

Decree Discharged Smyls of all Liability

Recognizing the allegations of the bill of complaint that Tudrycks had purchased Smyls' interest in said property, the decree cancelled "all manner of indebtedness whatsoever owing by the said Tony Tudryck and Mary Tudryck, his wife, and Andrew Smyl and Victoria Smyl, his wife, *whether created by joint act by them, or any of them, or several acts of any of them* * * *" (103).

What would Smyls' claim be if the situation were reversed?

Had no oil been discovered upon this property, and if after the Receiver had sold the property and applied the proceeds to the indebtedness due said Receiver, it was found that there was a substantial deficiency remaining unpaid on the books and records of said bank, do counsel for Smyls believe that the Receiver could successfully bring suit against Smyls claiming that this record did not adjudicate and settle those matters? The decree entered was a final decree and the decree discharged any and all indebtedness due said Receiver.

XI.

Facts Mis-stated in Smyls' Petition and Brief

In the Statement of Facts in the petition, and argument in the brief will be found many flagrant mis-statements of facts in this case.

We note only those which we feel are most important in connection with the questions before this court.

(a) Petition states:

"The prayers (22-26) likewise requested no relief against the Smyls and none of their rights were put in issue by the Tudryck bill." (Page 2 of Petition).

The Record:

Tudrycks claimed to be owners of the fee (Par. 1, R. 15); to have purchased Smyls' interest (Par VI, R. 10). They prayed for a decree quieting title in them and for removal of clouds from title by instruments of record or not of record. (Par. G., R. 25). (See opening statement of Attorney Harry J. Lippman (331) made in the presence of Smyl).

(b) Petition states:

"Petitioners' (Smyl) default for non-appearance was entered by Plaintiffs on October 3, 1938 (82-84). On the same date the joint answer of J. Otis Mutch and Harvey A. Chamberlain was filed, including a cross-bill naming Plaintiffs Tudryck and Petitioners Smyl as cross-defendants (45-76). * * *" (Page 2 of Petition).

The Record:

Proof of service upon Smyls was filed August 24, 1938. Answer and cross-bill of Chamberlain and Mutch was filed October 3, 1938. Tudrycks filed reply to said answer on October 21, 1938. (Default of Smyls was not filed until October 21, 1938) (Calendar Entries, R. 1, also Affidavit of Default, R. 82, Affidavit of Regularity, R. 83; Order Pro Confesso R. 84).

(c) Petition states:

"The answer of Mutch and Chamberlain (Paragraph 6) further denies that the Tudrycks had purchased the interest of the Smyls in the property (50-51)." (Par. 4, Petition, p. 3).

The Record:

Paragraph VI of the Bill of Complaint alleged directly the purchase by Tudrycks of the Smyls' interest.

The answer of Mutch and Chamberlain thereto is as follows:

"6. Answering paragraph VI of the bill of complaint defendant J. Otis Mutch says *that he remembers* that there was some talk on or about the 22nd day of November, 1924 about the plaintiffs purchasing the interest of the defendants Andrew Smyl and Victoria Smyl in the premises then owned by them but whether or not the purchase was ever completed by a written conveyance thereof, defendant J. Otis Mutch has no knowledge. Answering said paragraph of the bill of complaint defendant Harvey A. Chamberlain says that he has no knowledge, information or belief concerning the matters and things alleged therein and requires strict proof thereof" (50).

The prayer of the cross-bill leaves the matter open for the court to determine who was liable for the indebtedness due the bank. It reads: "and that they *or some of them* may be decreed to pay forthwith," etc. (Par. 2, R. 69).

(d) Petition states:

That at the original trial the testimony showed "affirmatively that Tony Tudryck and Mary Tudryck and Andrew Smyl and Victoria Smyl were co-owners of property in question * * *"(Par. 6, Petition, p. 3).

"No evidence was introduced showing or tending to show that Smyls had disposed of their interest in the property involved." (Par. 6, page 3 of Petition).

The Record:

Testimony of J. Otis Mutch supported the allegations of the bill of complaint concerning the purchase by Tudrycks of the Smyls' interest. There was then introduced the certificate of deposit given to Smyls at the time Tudrycks purchased their interest (409-410, 416, 490). Tudrycks paid Smyls $1000.00 for their interest.

(e) Petition states:

"* * * In the affidavits attached to their motions to set aside the decree the Smyls claim their interest in the property to be the same as is set out in the answer and cross-bill of Mutch and Chamberlain, to whose rights Joseph Martin, Receiver, has now succeeded (110-119)." (Par. 6, page 3 of Petition).

The Record:

After the decree in this case was entered Andrew Smyl was a witness and testified in behalf of Tony Tudryck in his suit for damages against Mutch for trespass to these lands. Smyl at that time recognized Tudrycks as sole owners thereof and claimed no interest in said property or subject matter of said suit (292).

(f) Allegation to the effect that H. L. Switzer was a stranger to this proceeding, set forth in paragraph 9, page 4 of the Petition, is answered in a prior portion of this brief.

(g) Petition states:

That the decree was entered pursuant to stipulation. (Par. 10, page 5 of Petition).

The Record:

We have shown that the decree as to Smyls was taken as confessed and in addition thereto was supported by the testimony taken in open court.

(h) Petition states:

"14. A motion (227) to set aside the above order of substitution and intervention of H. L. Switzer, permanent receiver, was denied by the trial court on July 8, 1946 (250)". (Par. 14, page 6 of Petition).

The Record:

Smyls were not parties to that motion. That was a motion by Tudrycks made in 1946 (227).

(i) Brief states:

"* * * The complaint specifically said (par. 14, R. 22) that *no relief* was sought against the Smyls except to prove that the above-mentioned deed given by the Smyls and Tudrycks to the bank was in fact a mortgage. The Tudryck complaint in no place put in issue the question of the title of the Smyls to the property in suit." (Brief, page 10).

The Record:

The bill of complaint did put in issue the question of Smyls' title to the property in suit. Tudrycks claimed to be the owners in fee (See prior portion of this Brief). The bill of complaint did not state "that *no relief" was sought against Smyls.* Paragraph XIV, R. 22, alleged that "no *personal* relief" was sought against Smyls.

The bill of complaint prayed "and that this court decree that your plaintiffs herein be the owners of the fee of the premises in this cause involved * * *" (Par. G. R. 25-26).

Further proof that Smyls had no interest in said property is shown by the testimony of Andrew Smyl in law case No. 874 entitled Tony Tudryck vs. J. Otis Mutch in which Tudryck obtained judgment against Mutch for trespass, etc. Had Smyl been co-owner of the property, he would have been a necessary party plaintiff to that suit and would have claimed a part of the judgment which was subsequently paid.

(j) Brief states:

"As has been pointed out, therefore, the pleadings adopted by the Receiver of the bank as well as the evidence introduced at the hearing showed affirmatively and conclusively that the Smyls were the owners of an interest in the property in suit." (Brief, page 11).

The Record:

We have noted under subdivision (c) hereof the allegations of the pleadings filed by J. Otis Mutch concerning the purchase by Tudrycks of the Smyls' interest. The cross-bill prayed for foreclosure of mortgages. Decree was not entered under the cross-bill, but was entered pursuant to the allegations of the bill of complaint taken as confessed as to Smyls.

J. Otis Mutch did testify concerning the purchase by Tudrycks of the Smyl interest and the further loan of $1000.00, made to enable Tudrycks to purchase Smyls' interest, and identified the certificate of deposit given to Mrs. Smyl for part of that consideration.

We have noted the facts as shown by the affidavit of Harry J. Lippman that Andrew Smyl was present in court and suggested questions to be put to witness J. Otis Mutch of the circumstances surrounding the sale by Smyl of his interest to Tudrycks. Allegations of the Tudryck bill of complaint in which they allege the purchase from Smyls, etc., taken as confessed as to Smyls, had the same force as evidence produced upon the trial. Under the Michigan practice, it was not necessary to support allegations taken as confessed, by oral testimony in open court. However, there was such supporting testimony as shown by the cross examination of J. Otis Mutch.

(k) Brief states:

"These parties, disregarding all the pleadings and testimony, including the pleadings of the bank adopted by the Temporary Receiver when he intervened,

and disregarding the documentary evidence introduced at the trial, all of which disclosed the interest of the Smyls in the property, stipulated in part as follows (98, 99): * * *" (Page 12, Brief).

The Record:

The defendants Smyl had disregarded the court summons and bill of complaint served upon them, and by so doing they admitted they had no interest in the subject matter of said suit. The testimony of J. Otis Mutch revealed the reason for Tudrycks and Smyls separating and the source of the money that was used to pay Smyls for their interest, etc. The documentary evidence showed the deed from Smyls and Tudrycks to the bank together with land contract from the bank back to Tudrycks alone which was Exhibit A. attached to land contract (27).

(l) Brief states:

"The Smyls were strangers to this stipulation. They were not served with the cross-bill filed by the bank, the only proceeding claiming relief against them, and had no notice that their title to the property was to be adjudicated by the Court. They were paid nothing for their share of the property taken away by the court decree entered pursuant to the above stipulation. * * *" (Page 12, Brief).

The Record:

They had notice that the Tudrycks were claiming to be the owners of the fee of said property as against them and all other defendants. Such notice was by personal service of court summons together with bill of complaint and injunction.

They were paid for their share of the property. Testimony of J. Otis Mutch showed the loan of $1000.00 by the bank in 1924 for such purpose and identified the certificate of deposit for $800.00 made payable to Mrs. Smyl. He testified:

"Q. By the way, we spoke yesterday with reference to the time when Mr. Smyl sold out his interest in the farm to Tudryck, on which occasion the bank took Exhibit No. 5, I think that is the $1,000.00 mortgage; did you give Mr. Smyl $1,000.00 on that occasion?

A. I think Mr. Smyl paid a note with it, that paper is not there, Smyl note, a certificate was entered on our register for $800.00 and I assume that he took the difference.

Q. A certificate of deposit?

A. Yes, sir.

Q. Can you find the records here with reference to that transaction, showing whether or not you delivered over $1,000.00 in any form to Andrew Smyl in 1924 when he sold out to Tudryck?

A. That is the Smyl note? I think it was a small note, I think, about $20.50.

Q. $20.50?

A. I am saying that from my memory.

Q. Can you find it?

A. I can, but it will take a little time, yes, sir.

Q. Have you the note record there, perhaps you can put your finger on it?

A. Mr. Smyl paid No. 24512 for —

Q. What is the date of the note?

A. October 30th, 1924.

Q. May I see that exhibit? I show you Exhibit No. 5, what is the date on that?

A. November 22nd, 1924.

Q. 1924?

A. Yes, sir.

Q. When was this twenty — what was this note, you say twenty dollars?

A. $20.50.

Q. When was it due?

A. November 30th.

Q. All right. $20.50 note was paid, what became of the balance of that $1,000.00?

A. As I answered you a few minutes ago.

Q. Can you show me the book record indicating that $980.00?

A. A certificate of deposit was made that day for $800.00.

Q. A certificate of deposit, have you the bank record?

A. I have the paper right here.

Q. Certificate of deposit?

MR. BILITZKE: What is the date on that?

A. November 22nd, 1924, the date of the mortgage.

MR. LIPPMAN: To Smyl for $800.00?

A. To Victoria Smyl.

Q. To Smyl's wife, Victoria, for $800.00, right?

A. Yes, sir.

Q. What became of the rest of the money?

A. I assume it was cash.

Q. Do you know?

A. I would not say this is the amount.

Q. Would not say — was that certificate of deposit delivered by you to either Mr. Smyl or his wife?

A. I imagine so.

Q. Can you tell whether it was or not?

A. No, I have no way of telling.

Q. Don't you recall that you absolutely refused to give that money to Smyl, and that on different occasions for a period of almost a year he came to you repeatedly and asked you for money, and you finally gave him $400.00 of it when he bought his place?

A. This money was deposited with a little notation on the top of the certificate they were making the deposit with the understanding that it may not be withdrawn in less than a year's time" (482-484).

"A. There is a notation on the back of it, Mrs. Smyl came in and got the money, the notes all paid to balance.

Q. Do you show when the $400.00 was withdrawn on that certificate of deposit?

A. During that year.

MR. BILITZKE: What year?

A. That would be the year following, between November 22nd, 1924, and November 24th, 1925; Mr.

Smyl borrowed a total of $822.44; they were allowed $32.00 interest.

Q. Is that the way in which the $800.00 was disposed of?

A. Yes, sir" (485).

"MR. LIPPMAN: Exhibit No. 30 is a certificate of deposit for $800.00 that you claim that the bank issued to Mr. Smyl?

A. Victoria Smyl" (490).

(m) Brief states:

"These two parties, the Tudrycks and the Permanent Receiver, after the case had been partially tried, abandoned the lawsuit entirely. They used the court to put into effect a compromise settlement which was agreeable to them. * * *" (Brief, page 13).

The Record:

Tudrycks, in their bill of complaint, asserted ownership of said premises as against Smyls, the bank and all other defendants. They were quieting title against all of the defendants. When the settlement was made the property was in custodia legis. The court was a necessary party to the settlement agreement. The lawsuit *was not abandoned.* Realizing the necessity of quieting title as alleged in the bill of complaint, the court had the right to grant the relief as to Smyls and other defendants as alleged in the bill of complaint and there was nothing to prevent Tudrycks from conveying their interest to the Receiver. The final decree was entered "pursuant to the testimony in said cause and agreement of said parties as evidenced by this stipulation" (99).

(n) Brief states:

The Michigan Court did not have jurisdiction of the parties. (Brief, page 13).

The Record:

Tudrycks had invoked the jurisdiction of a court of general jurisdiction in the State of Michigan. Proper

service of process had been made upon all of the defendants. The parties were in court and proceeded with the trial of said cause. Andrew Smyl was in court assisting Tudrycks in the presentation of their testimony.

(o) Brief states:

"* * * The Michigan Supreme Court has previously held in an identical situation that a decree by a defendant against a co-defendant on a cross-bill which was not served on said cross-defendant is void. Huebner v. Winskowski, 246 Mich. 77." (Brief, page 13-14).

The Record:

The Michigan Supreme Court in answer to that argument, found "The situation is unlike that presented in Huebner v. Winskowski, 246 Mich. 77, where one seeking to enforce a mechanic's lien filed a cross-bill and failed to serve those having an interest in the property" (279 Supplement).

For further discussion of Huebner v. Winskowski, see Subdivision XII of this Brief.

(p) Brief states:

"* * * Furthermore, the court did not have jurisdiction of H. L. Switzer, Permanent Receiver. Although the Temporary Receiver intervened, the Permanent Receiver did not. Neither was he added nor substituted as a party to the proceeding prior to the entry of the decree. * * * The trial court acknowledged this defect in the proceeding and attempted to correct the same by entering a nunc pro tunc order on its own motion on April 26, 1946, at the hearing of the motion of petitioners' to set aside the decree, substituting Switzer as a party. * * *" (Page 14 of Brief).

The Record:

Switzer, Receiver, was not a stranger. See subdivision VI of this Brief. Nunc pro tunc order was properly entered as authorized by the state statute of amend-

ments and in harmony with previous Michigan decision, namely: Daly v. Hosmer, 102 Mich. 392.

Attorney J. P. Mikesell, appearing for both Tudrycks and Smyls was present in open court when the nunc pro tunc orders were signed by the trial judge and filed (185-188).

(q) Brief states:

"The Michigan court did not have jurisdiction of the subject matter included in the decree. * * * The sole subject matter of the original bill and the cross-proceeding before the trial court was the cancellation or foreclosure of the three (3) mortgages. * * *" (Page 14 of Brief).

The Record:

The court had jurisdiction of the subject matter namely: bill for accounting, to quiet title, discharge mortgages and for general relief.

Tudrycks alleged that they were the sole owners of said premises and that it was free from all indebtedness and asked the court for decree quieting title. The decree granting relief as to Smyls followed the allegations of the bill of complaint and granted the relief prayed for. By the decree, the court confirmed the settlement as evidenced by conveyance from Tudrycks to Switzer, Receiver, an officer of the court.

XII.

Huebner vs. Winskowski, 246 Mich. 77, does not hold that process must always be served in support of Cross-Bill.

At the top of page 14 of Smyls' brief, counsel cite *Huebner v. Winskowski,* 246 Mich. 77, claiming that it is identical with the case at bar.

Both the state trial court and the Michigan Supreme Court held that the questions in the Huebner case were not the same as in the instant case.

We have examined that case with considerable care and also were able to check the records and briefs in that case.

There the plaintiff filed bill to foreclose a mechanic's lien. Etrich, one of the defendants, filed a cross-bill claiming a lien against the same property.

The Michigan Supreme Court said:

> "There was no service incident to this cross-bill upon the plaintiff or upon the defendants Szewczul, the latter being the real parties in interest. Not only was there no service of any character obtained by the cross-plaintiff Etrich on the defendants Szewczul but no issue was framed as to such defendants by default or otherwise. With the record in this condition, and without knowledge on the part of Mr. and Mrs. Szewczul or their attorney, the cross-plaintiff Etrich took a decree foreclosing his lien."
>
> "* * * *without service of process or any notice whatever* upon the opposite parties did not afford them their day in court and was without binding force or effect."

The records and briefs in that case show that no service of the cross-bill was ever made upon opposing counsel, namely, the attorney of record for the plaintiff. Paragraph 2 of Motion to Vacate said Decree as found in Records and Briefs, states the following:

> "2. That the said Joseph Etrich and his attorney, Albert McClatchey, did not serve a copy of the answer and cross-bill upon Leonard L. Szymanski, attorney for Szymon Szewczul and Mary Szewczul his wife, nor did he serve a copy of said answer and cross-bill on the defendants Szymon Szewczul and Mary Szewczul, his wife, although as aforesaid, the said defendants Szymon Szewczul and Mary Szewczul, had entered their appearance."

The Michigan Supreme Court is careful to state that the decree was entered *"without service of process or any notice whatever."*

XIII.

Analysis of Other Questions Raised and Authorities Cited in Petitioners' Brief

Clark vs. Savings Association, 217 Federal, 640, (Page 18 of Brief):

In that case the relief granted was outside the scope of the pleadings. The court found that the decree was void as to stockholders not before the court who had a right to expect that their rights would be protected by the decree.

Applying that reasoning to the instant case, Smyls knew from the summons and bill of complaint that Tudrycks claimed to be the sole owners of said property, having purchased Smyls' interest therein in November, 1924. That unless they appeared in the case that a decree would be entered in accordance with allegations of the bill of complaint, namely: that said Smyls had no right, title or interest in said premises. The decree quieting title as to Smyls follows the language of the bill of complaint.

Hipp vs. Charlevoix County, 62 Mich., 456 (Page 15 of Brief):

That case is not controlling. It did not involve a controversy between individuals. They undertook to review by certiorari action of the board of supervisors dealing with the result of a canvass of votes cast with reference to location of the county seat. The proceeding was purely statutory. The Michigan Supreme Court refused jurisdiction.

Goetz vs. Black, 256 Mich. 565, (Page 15 of Brief):

That case is not controlling. The petitioner had failed to file any petition for writ of habeas corpus. The Supreme Court found that no suit had been properly commenced and that the court could only act judicially when jurisdiction had been conferred. In the instant case the suit

was not only commenced, but process was served, the court entered upon the trial of same, and entered final decree.

Reynolds vs. Stockton, 140 U. S. 254, (Page 16 of Brief);
Standard Oil Co. vs. Missouri, 224 U. S. 270, (Page 16 of Brief).

For discussion of these cases, we refer you to our brief in cause No. 709, submitted herewith.

Due Process of Law:

In considering the question of due process of law, counsel for Smyls rely principally upon *Reynolds vs. Stockton* and *Standard Oil Co. vs. Missouri*, supra.

As fully covered in our previous brief in cause No. 709, it is our understanding that the provisions of the 14th amendment to the constitution of the United States have no application to the issues sought to be urged by petitioners Smyl. That the said amendment refers to state action exclusively.

There was due process of law under the Michigan constitution. The record here shows the following:

1. The issues presented by the Tudrycks' Bill of Complaint taken as confessed as to Smyls, which the decree follows.
2. Notice to Smyls by service of summons and bill of complaint.
3. Testimony taken upon the trial.
4. Decree of the court finding that Smyls had no right, title or interest in said property supplemented by agreement made between Tudrycks and the Receiver in settlement of said cause.

This is not a case where the decree or judgment was entered against Smyls granting relief not prayed for and not based upon the allegations of the bill of complaint.

The lower trial court found:

> "* * * Yet it is also true that every portion of the decree was within the claims asserted in the bill of complaint. So the assertions of petitioners that the decree took property of Smyls without due process become meaningless. Smyls had their day in court concerning the identical issues raised by the bill of complaint and settled by the resulting decree. The presence or absence of the cross-bill in this case has not affected the defendants Smyl; it has neither increased nor diminished their rights, nor has its filing been the means of taking away their property. In fact in an accounting suit a cross-bill is not a requisite to granting affirmative relief to a defendant. Long v. Earle, 277 Mich. 505 at 527-8. In my opinion the decree was substantially responsive to the issues tendered by the bill and answer. * * *" (210).

XIV.

Challenge of Grounds of Jurisdiction

At the beginning of this brief appear "Challenge of Grounds of Jurisdiction," all centering around the proposition that the judgment and decree of the Michigan Supreme Court was based upon non-federal grounds, and that no federal constitutional question was involved in said cause.

The grounds urged are the same as those which appear in our brief in cause No. 709, submitted herewith. To save repetition, we refer this court to the authorities therein cited in support thereof, and adopt said brief as a part of this present brief.

Equal protection of the laws not urged in State Courts.

Under "Questions Presented" on page 8 of petition, Smyls allege as one of the questions presented that they have been denied "equal protection of the laws as guar-

anteed by the 14th amendment to the constitution of the United States of America."

That question was not urged in the state courts. The petition to vacate decree filed in the state trial court urged only "taking of property without due process of law," under said constitution (Par. 9, R. 110). In the "Statement of Reasons and Grounds of Appeal" in the Michigan Supreme Court, they charged that they were denied "due process of law" in violation of said constitutional provision (Par. 10, R. 261).

There having been "due process of law," we contend that there is no basis for the argument that they were denied the equal protection of the laws.

CONCLUSION

Under "Conclusion", page 19 of Petitioners' brief, appears a resume of the questions of law and of fact argued in behalf of Smyls. With little regard to the facts as shown by this record, opposing counsel have undertaken to twist and distort the facts shown by this record. To clarify same, it has been necessary for us to carefully call attention to the many mis-statements of facts and erroneous argument pertaining to the rules of law.

The decision below is correct and there is no warrant for review of the questions presented by the petition. The petition should, therefore, be denied.

Respectfully submitted,

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April, 1948.